114-176

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 203.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH S. MILLER, AUDITOR OF THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED MAY 5, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 Supreme Court of Appeals of West Virginia, Wheeling.

CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
JOSEPH S. MILLER, AUDITOR.

Petition.

To the honorable the judges of the supreme court of appeals of the State of West Virginia:

Your petitioner, Joseph S. Miller, auditor of the State of West Virginia, respectfully shows that as such auditor, he, as well as the State of West Virginia, is aggrieved and injured by a decree of the circuit court of Ohio county, West Virginia, rendered and entered on the 6th day of June, 1881, in a cause in chancery with injunction wherein The Chesapeake and Ohio Railway Company was complainant and your petitioner, as such auditor, defendant; and also by a decree and order of said court rendered in said
2 cause on the 2d day of May, 1881. A copy of the record in said cause is herewith presented.

By an inspection of the record in this cause it will be seen that it involves the question of the liability of the complainant for State, county, and district taxes, and whether the State can impose any taxation whatever upon said company or the property of the complainant.

For causes of error your petitioner says that the circuit court erred in overruling, by its decree of 2d May, 1881, the defendant's demurrer to plaintiff's bill; that the circuit court erred in its decree of 6th June, 1881, in refusing to dissolve the injunction awarded the complainant and in perpetuating the said injunction.

The foregoing errors are manifest upon the record, and your petitioner, therefore, prays for an appeal from the decrees complained of, and that the same may be reviewed and reversed; and as said appeal is necessary to protect the interests of the State of West Virginia, and is asked for by your petitioner as a public officer of said State, he prays that it may be allowed without bond.

JOSEPH S. MILLER,
Auditor of the State of West Virginia.

I, Robert White, an attorney practicing in the supreme court of appeals of West Virginia, do certify that the matters set forth in the foregoing petition and accompanying record should be reviewed by the said supreme court of appeals.

ROB'T WHITE.

June 16th, 1881.

An appeal was allowed in court at Wheeling June 11th, 1881, no bond being required.

Attest: O. S. LONG, *Clk.*

3 *Record.*

WEST VIRGINIA:

Pleas and Proceedings before Part 2 of the Circuit Court of Ohio County, at the court-house thereof, on the 6th day of June, 1881, and in the 18th year of the State:

Be it remembered that heretofore, to wit, on the 9th day of January, 1880, came The Chesapeake and Ohio Railway Company and sued out of the clerk's office of the circuit court of Ohio county, West Virginia, a writ of summons in chancery against Joseph S. Miller, auditor of the State of West Virginia, as such auditor, which writ, with the endorsement thereon of service, and also the restraining order endorsed thereon, is in the words and figures following, to wit:

Summons.

The State of West Virginia to the sheriff of Ohio county, Greeting:

We command you that you summon Joseph S. Miller, auditor of the State of West Virginia, as such auditor, if he be found in your bailiwick, to appear at the clerk's office of the circuit court of Ohio county, at rules to be held for the said court, on the first Monday in February, 1880, to answer a bill in chancery exhibited against him in the said court by The Chesapeake and Ohio Railway Company. And have then there this writ.

Witness Samuel B. McColloch, clerk of our said court, at the court-house of said county, in the city of Wheeling, the 9th day of January, 1880, and in the 17th year of the State of West Virginia.

SAMUEL B. McCOLLOCH, *Clerk.*

4 (Endorsement.)

Bond in the penalty of $2,500 having been given as required, Joseph S. Miller, auditor of the State of West Virginia, as such auditor, is hereby enjoined and restrained from adding to the amount of the taxes alleged to have been assessed upon the complainant's property, ten per centum, or any other sum, and from certifying said alleged taxes, or any part thereof, to the sheriffs of the counties mentioned in said auditor's statement, filed with complainant's bill, or any or either of said counties, for collection, or for any other purpose, or from doing anything whatever looking or tending to the collection of said alleged taxes, or any part thereof, from complainant or out of its property, as prayed for in the bill filed herein, until the further order of the circuit court of Ohio county, or the judge thereof in vacation.

SAMUEL B. McCOLLOCH, *Clerk.*

Jan'y 9, 1880.

Sheriff's Return.

Executed the within writ by delivering a true copy thereof to Joseph S. Miller, auditor of the State of West Va., this 9th day of Jan'y, 1880, at 2 o'clock p. m.

GEO. R. TINGLE, *S. O. C.*

Injunction.

Injunction granted as prayed for in the within bill, on the complainant, or some one for it, entering into bond, with security to be approved by the clerk of the circuit court in the penalty of $2,500, with condition to pay all such costs and damages as may be incurred or sustained by the defendant, or the State of West Virginia, or any other, by reason of this injunction in case this injunction is dissolved.

Given under my hand, this 7th day of Jan'y, 1880.

J. SMITH,

Judge of the 7th Judicial Circuit of West Virginia.

To the clerk of the circuit court of Ohio county, W. Va.

5 And at another day, to wit, at rules held in the clerk's office of the circuit court of Ohio county, West Virginia, on the first Monday in Feb'y, 1880, came the complainant, by its counsel, and filed its bill and exhibits therewith against the defendant, which are in the words and figures following, to wit:

Bill of Complaint.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

against

JOSEPH S. MILLER, Auditor of the State of West Virginia.

The bill of complaint filed in the circuit court of Ohio county, West Virginia, by The Chesapeake and Ohio Railway Company against Joseph S. Miller, auditor of the State of West Virginia, as such auditor.

To the honorable judge of said court:

Humbly complaining, The Chesapeake and Ohio Railway Company, a corporation created and organized under and by virtue of the laws of the States of Virginia and West Virginia, and existing and doing business in said States, showeth unto your honor as follows:

On the 18th of February, 1836, the Legislature of Virginia passed an act entitled "An act incorporating the stockholders of the Louisa Railroad Company," for the purpose of constructing a branch road from the Richmond, Fredericksburg and Potomac railroad through the counties of Louisa and Orange, towards the Blue Ridge mountains. This road was constructed from Hanover Junction to Louisa Court-House, and was for some time operated by the Richmond, Fredericksburg and Potomac Company, but was subsequently extended to the eastern base of the Blue Ridge on the west, and to the city of Richmond on the east, under the act of Assembly of March 8th, 1847, entitled "An act providing for the extension of the Louisa railroad to the eastern base of the Blue Ridge," and the act of March 27th, 1848, entitled "An act for the extension of the Louisa railroad to the dock in the city of Richmond."

By an act passed March 5th, 1849, entitled "An to incorporate the Blue Ridge Railroad Company, and for other purposes," the
6 board of public works of Virginia were authorized to construct, and afterwards did construct, a railroad and tunnel from the eastern to the western base of the Blue Ridge; and under that and subsequent acts passed, one January 30th, 1850, entitled "An act for the extension of the Louisa railroad from Staunton to Covington, and for other purposes," and another Feb. 2d, 1850, entitled *entitled* "An act to change the name of the Louisa Railroad Company, to guarantee the bonds of the Virginia Central Railroad Company, and for other purposes," this line of railway was continued under the new designation of the Virginia Central Railroad Company, and was in the spring of the year 1861 completed as far as Jackson's river, in the county of Allegheny, when the work of construction was interrupted by the beginning of hostilities, and was carried no further until the year 1867, when it was completed to Covington. Meanwhile, on the 15th of February, 1853, another act was passed by the General Assembly of Virginia, entitled "An act to authorize the board of public works to construct a railroad from Covington to the Ohio river on State account," the purpose of which was to incorporate the board of public works for the completion of this line of railroad to some point on the Ohio, near the mouth of the Big Sandy. Accordingly, the construction of this part of the work was undertaken by the Commonwealth of Virginia entirely on State account, and was prosecuted by means of appropriations under several acts of the Legislature, until arrested by the war of 1861, up to which date about three million dollars was expended upon it by the State. Upon the dismemberment of the State of Virginia by the formation of the State of West Virginia, in the year 1861, the ownership *ownership* of the portion of the Covington and Ohio railroad, then partially constructed, lying withing the territorial limits of the State of West Virginia, was considered to have devolved upon that State. After the cessation of hostilities, in the year 1865, the completion of this line of railway became an object much desired by the people of West Virginia for many reasons, but particularly that
7 the mineral deposits of the New and Kanawha river regions might find access to market. To this end an act was passed by the Legislature of West Virginia on the 1st of March, 1866, entitled "An act to incorporate the Covington and Ohio Railroad Company," almost identical in terms with an act similarly entitled which had been passed by the General Assembly of Virginia on the 26th of February, 1866, creating a charter for the completion and operation of a railroad from Covington to the Ohio river, and appointing commissioners to act on the part of the State of West Virginia in conjunction with the commissioners appointed by the State of Virginia, whose duty it was made by the act to offer the benefits of the charter for the acceptance of capitalists, so as to secure the speediest and best construction, equipment, and operation of said railroad. One of the inducements offered by the State for the acceptance of the charter by capitalists and their organization thereunder, was a provisio that "no *no* taxation upon the property

of the said company shall be imposed by the State until the profits of said company shall amount to ten per cent. on the capital of the company;" for which provision reference is hereby made to the seventh sections of the acts of 26th February and March 1st, 1866, aforesaid. Great difficulty was experienced, however, in finding parties able and willing to undertake the heavy expenditures necessary to the prosecution of the enterprise, and afterwards, on the 26th of February, 1867, another act was passed by the Legislature of West Virginia (followed on the 1st of March, 1867, by the passage of a similar act by the General Assembly of Virginia) entitled "An act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river," by which act additional privileges were conferred upon the Covington and Ohio Railroad Company, which might be organized under the acts aforesaid, and among others, the privilege of acquiring not exceeding five millions of acres of land in payment for subscriptions of stock, or by purchase, as will appear by reference to the eighth section of said act of 26 February, 1867, and the ninth section of said act of 1 March, 1867.

8 It was further provided by said acts, in the fourteenth section of the one and the fifteenth section of the other, that the Virginia Central Railroad Company might contract with the Covington and Ohio railroad commissioners for the construction of the railroad *railroad* from Covington to the Ohio river, and in the event such contract be made, the said Virginia Central Railroad Company should be known as the Chesapeake and Ohio Railroad Company, and should be entitled to all the benefits of the charter of the Covington and Ohio Railroad Company, and to all the rights, interests, and privileges which by the acts were conferred upon the Chesapeake and Ohio Railroad Company when organized.

And subsequently, on the 31st of August, 1868, a contract was made and entered into by and between John B. Baldwin, George W. Bolling, Thomas S. Flourney, and William J. Robertson, the commissioners of the State of Virginia under the said acts of February 26th, 1866, and March 1st, 1867, of the first part, and James Burley, Z. D. Ramsdell, Joel McPherson, and John S. Cunningham, the commissioners of the State of West Virginia under the said acts of March 1st, 1866, and February 26th, 1867, and an amendatory act of February 6th, 1868, of the second part, and the Virginia Central Railroad Company, of the third part, whereby the said Virginia Central Railroad Company undertook and contracted to construct the said railroad, and it was contracted, declared, and certified by the said commissioners that the said company should thereafter be known as the Chesapeake and Ohio Railroad Company, and be entitled to all the benefits of the charter of the Covington and Ohio railroad, and to all the rights, interests, and privileges which by the statutes aforesaid are conferred upon the Chesapeake and Ohio Railroad Company when organized.

Under this contract, which was formally adopted by the Legislature of West Virginia by an act passed January 26th, 1870, entitled "An act conferring and amending the charter of the Chesapeake and

Ohio Railroad Company," the Chesapeake and Ohio *Ohio* Railroad Company was formed and organized, and at great expense
9 proceeded to complete and operate the said line of railway through the State of West Virginia to the great advantage of said State.

At the time of the formation and organization of the Chesapeake and Ohio Railroad Company, as aforesaid, there was existing all the rights, franchises, privileges, and property of the Virginia Central Railroad Company, certain trust deeds or mortgages, which are accurately stated in certain decrees of foreclosure and sale, to be hereinafter more particularly mentioned, all of which continued to exist as liens on the property described in said trust deeds or mortgages in the hands of the Chesapeake and Ohio Railroad Company.

After the formation and organization of the Chesapeake and Ohio Railroad Company there was executed, acknowledged and delivered by said company from time to time, and duly recorded in the several counties in West Virginia through which complainant's railway now runs, sundry other trust deeds or mortgages, in and by which was conveyed all the works, property, estate, rights, franchises, and privileges of and belonging to the Chesapeake and Ohio Railroad Company, of every kind, nature, and character, in either of the States of Virginia and West Virginia.

The first *the first* of the last mentioned trust deeds or mortgages was executed and delivered to Philo C. Calhoun, William Butler Duncan, William Orton, and Mathew F. Maury, trustees, is dated the first day of October, one thousand eight hundred and sixty-eight, and was made to secure the performance and payment of the obligations and liabilities therein mentioned, and the amount of which was afterwards ascertained and found in and by the decrees of foreclosure and sale, to be hereinafter more particularly mentioned. A certified copy of this trust deed or mortgage is herewith filed as part of this bill, marked Exhibit "A." (See Exhibit "A" herewith filed.)

The record of said trust deeds or mortgages was executed and delivered to William Butler Duncan and Philo C. Calhoun, trustees, is dated the fifteenth day of January, one thousand eight
10 hundred and seventy, and was made to secure bonds afterwards issued by said company under said trust deed or mortgage to the amount in the aggregate of fourteen millions nine hundred and twenty-two thousand dollars, with interest as in said trust deed or mortgage mentioned. A certified copy of the trust deed or mortgage is herewith filed as part of this bill, marked Exhibit "B." (See printed Exhibit "B" herewith filed.)

The third of said trust deeds or mortgage was executed and delivered to Philo C. Calhoun and William K. Kitchen, trustees, is dated the first day of October, one thousand eight *eight* hundred and seventy-two, and was made to secure bonds afterwards issued by said company under said trust deed or mortgage to the amount in the aggregate of twelve millions one hundred and seventy-four

thousand dollars, with interest as in said trust deed or mortgage mentioned.

A certified copy of this trust deed or mortgage is herewith filed as part of this bill, marked Exhibit "C." (See printed Exhibit "C" herewith filed.)

Some time after the execution of the last of the above-mentioned trust deeds or mortgages, default having been made in the payment of the interest payable on the indebtedness secured in and by that and all the preceding trust deeds or mortgages, the above-named William Butler Duncan and Philo C. Calhoun, trustees, instituted suits in the circuit court of the city of Richmond, in the State of Virginia, and in the circuit court of the county of Kanawha, in the State of West Virginia—the said courts having jurisdiction in the premises—against the Chesapeake and Ohio Railroad Company, the board of public works of the State of Virginia, John B. Young, and Robert R. Howitson, trustees, William Butler Duncan, Philo C. Calhoun, and William Orton, surviving trustees, James Lyons, sole surviving trustee, and Philo C. Calhoun and William K. Kitchen, trustees, the object and purpose of which were to foreclose the several *several* foregoing trust deeds or mortgages, and to effect a sale under said trust deeds or mortgages of all the works, property, estate, rights, franchises and privileges of and belonging to
11 the Chesapeake and Ohio Railroad Company. The suit so instituted in the State of Virginia was commenced on the twenty-seventh day of November, 1875, and that instituted in the State of West Virginia was commenced on the twenty-ninth day of November, 1875.

In these suits, respectively, such proceedings were had from time to time that on the 26th day of March, 1877, judgment and decree of foreclosure and sale under said trust deeds or mortgages was entered in the said suit so as aforesaid brought in the said circuit court of the city of Richmond, and afterwards such proceedings were had in the said suit that the said judgment and decree was modified and amended, as by reference thereto will appear; and on the 18th of December, 1877, a judgment and decree of foreclosure and sale under said trust deeds or mortgages was duly made and entered in the said suit so brought in the said circuit court for the county of Kanawha, in the State of West Virginia. Certified copies of the decrees aforesaid are herewith filed as part of this bill, marked, resp'ively, Exhibits "D" and "E." (See printed Exhibits "D" and "E" herewith filed.) In and by each of the said judgments and decrees William *William* C. Wickham was appointed a special commissioner to make the sale provided for and directed in the said decrees, and in pursuance of such appointment, and in conformity with the decrees aforesaid, said special commissioner did afterwards sell all and singular the premises, rights, privileges, and franchises, which in and by said judgments and decrees he was directed to sell. At such sale A. S. Hatch, C. P. Huntington, A. A. Law, Isaac Davenport, Junior, and John Castree, styling themselves a committee of purchase and reorganization, for themselves and others, became the purchasers thereof, and

said sale having been duly reported by said special commissioner, was by the said courts, respectively, duly confirmed. Certified copies of the decrees confirming said sale are herewith filed as part of this bill, marked, respectively, Exhibits "F" and "G." (See Exhibits "F" and "G.")

12 And the said purchasers having duly complied with the terms of the sale, afterwards, to wit, on the 29th day of June, 1878, an order was made by the said circuit court of the city of Richmond, and on the 1st day of July, 1878, a similar order was entered in the said circuit court of the county of Kanawha, authorizing and directing William C. Wickham, as special commissioner, to execute a deed of conveyance pursuant to such decrees and sale. Certified copies of said decrees are herewith filed as part of this bill, marked, respectively, Exhibits *Exhibits* "H" and "I." (See Exhibits "H" and "I" herewith filed.)

Accordingly the said William C. Wickham, special commissioner, as aforesaid, did, on the first day of July, 1878, execute, acknowledge and deliver to the purchaser aforesaid a conveyance pursuant to the sale made by him as aforesaid, and the decrees aforesaid, in which conveyance, which was the said 1st day of July, also duly executed and acknowledged by the said A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Junior, and John Castree, purchasers as aforesaid, the said purchasers declared that the name by which, by virtue of such conveyance and the statutes in such cases made and provided, they should and would become a corporation, is and shall be The Chesapeake and Ohio Railway Company. The said conveyance, executed and acknowledged as aforesaid, was thereupon duly recorded in all of the several counties in the States of Virginia and West Virginia, in which any of the works, property, estate, rights, franchises, and privileges, sold and conveyed as aforesaid, are situate or may be used and enjoyed. A certified copy of said conveyance is herewith filed as part of this bill, marked Exhibit "J." (See Exhibit "J" herewith filed.)

Complainant now avers that, by virtue of the matters aforesaid, it, on the 1st day of July, 1878, became and was, and has since continued to be, and now is, a corporation by the name of *of* The Chesapeake and Ohio Railway Company, entitled to all the works, property, estate, rights, franchises, and privileges theretofore owned,

13 used, and enjoyed by The Chesapeake and Ohio Railroad Company, including therein the exemption from taxation on the property of said company, conferred by the contract, by which said company was formed and organized, made between the commissioners appointed and acting on behalf of the States of Virginia and West Virginia, respectively, and the Virginia Central Railroad Company, which contract is set out at length in the act confirming and approving the same, passed by the Legislature of West Virginia on January 26, 1870, and by the several acts of the Legislatures of Virginia and West Virginia in said contract mentioned.

Complainant avers that its profits and those of the Chesapeake and Ohio Railroad Company have never, at any time, amounted to ten per cent. a year on its capital. In fact, complainant avers that

the aggregate profits of the Chesapeake and Ohio Railroad Company and of the complainant company from the formation of the Chesapeake and Ohio Railroad Company up to this time have not amounted to ten per cent. on the capital of said Chesapeake and Ohio Railroad Company, or of the complainant company, and that its property is not now, and since the formation of the Chesapeake and Ohio Railroad Company has not been, subject to taxation, but is protected therefrom by *by* the exemption from taxation aforesaid.

Complainant avers that Joseph S. Miller, auditor of the State of West Virginia, has made out and transmitted to the president of the complainant company a detailed statement of the amount of taxes claimed to be due for the year 1879 from the complainant company for State, State school, county, and district purposes in the State of West Virginia, amounting in the aggregate to $27,927.40, and has accompanied the same with a letter signed by said auditor, bearing date December 10th, 1879, addressed to such president, describing said statement as a statement of the taxes assessed against the Chesapeake and Ohio Railroad Company in the State of West Virginia for the year 1879, and stating in said letter that if payment
14 of the amount so assessed be made at *at* the treasury of the State on or before the 20th day of January next, two and a half ($2\frac{1}{2}$) per centum will be deducted therefrom, and adding that if not paid by said 20th day of January it will be his duty to add ten per centum to the amount and certify to the proper officers for collection.

The said statement and letters are herewith filed as part of this bill, marked Exhibits "K" and "L." (See Exhibits "K" and "L" filed herewith.)

Complainant *complainant* avers that it is informed, and believes it to be true, that the said Miller, auditor as aforesaid, bases his action in the premises on an act of the Legislature of West Virginia, passed 31st January, 1879, purporting to amend section seven of the act of 1st March, 1866, hereinbefore mentioned, so as to repeal the exemption from taxation thereby granted; but complainant avers that said act of 31st January, 1879, has never been accepted or agreed to by it, and is advised that in so far as it attempts to deprive complainant of the benefit of the exemption aforesaid, it is null and void, and that said auditor is not justified by it nor by any law of the State of West Virginia imposing taxes for the action done and threatened to be done by him; said act, as well as all other acts which were designed or can be construed to impose taxes upon the property of complainant in derogation of the exemption granted by said act of 1st March, 1866, being in violation of the provisions of the Constitution of the United States, which forbids any State from passing any law impairing the obligation of contracts. Complainant *complainant* avers that the taxes claimed as aforesaid to be due from complainant, and claimed as aforesaid to have been assessed on its property, and each and every item thereof which goes to make up the aforesaid sum of $27,927.40, is illegal and void, and constitutes no valid claim or charge upon the complainant or its property, and

it should not be required or compelled to pay the same, or any part thereof, nor should the enforced collection thereof, or any part
15 thereof, by the auditor of the State of West Virginia, or by any one under his authority, or with his sanction, be made or permitted. Complainant is advised and avers that the taxes claimed to have been assessed as aforesaid, and alleged to be due from complainant as aforesaid, are illegal and void, because of the aforesaid exemption from taxation, and also because there was no authority of law for any assessment whatever of the property of complainant in the State of West Virginia for the year 1879.

Complainant now further avers that unless restrained by injunction, the defendant, Joseph S. Miller, as auditor of the State of West Virginia, will, on January 20th, 1880, add ten per centum to the amount, and certify to the sheriffs of the several counties in West Virginia in which complainant's property is situate, and which are mentioned in the *the* detailed statement sent by him as aforesaid to complainant's president, the amount of the taxes and levies claimed to have been assessed on the property of complainant within their respective counties, with a view to have the same collected, if need be, by distraining and levying upon and selling complainant's property, until a sufficient sum is realized to pay such alleged taxes, with the ten per cent. added. To permit this would be unjust and oppressive, would involve a multitude of suits with the said sheriffs, or those purchasing at the sales made by them of complainant's property, and would, moreover, be in violation and disregard of complainant's chartered rights and of the aforesaid contract between the States of Virginia and West Virginia and the Virginia Central Railroad Company—to all the benefits whereof complainant is entitled.

In view of the premises, and because complainant is otherwise remediless, complainant prays that Joseph S. Miller, as auditor of the State of West Virginia, be made defendant to this bill, and be required to answer the same fully and particularly; that he be restrained by injunction from adding to the amount of the alleged taxes ten per centum, or any other sum, and from certifying said alleged taxes, or any part thereof, to the sheriffs of the coun-
16 ties *counties* mentioned in said auditor's statement, or any or either of said counties, or for *for* collection or for any other purpose, or from doing anything whatever looking or tending to the collection of said alleged taxes or any part thereof, from complainant or out of its property. And complainant prays for such other, further, and general relief in the premises as to your honor's court shall seem meet and the nature and circumstances of the case shall require. And as in duty bound, complainant, who has caused this bill to be signed with its name and sealed with its seal by its president, will ever pray, &c.

[SEAL.] CHESAPEAKE & OHIO RAILWAY CO.,
By C. P. HUNTINGTON, *President.*

WM. J. ROBERTSON,
WM. H. HOGEMAN,
Solicitors.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

This day, before the undersigned, a notary public in *in* and for said city, county, and State, personally appeared C. P. Huntington, to me well known, and made oath that he is president of the Chesapeake and Ohio Railway company, and that as such president he is acquainted with the matters alleged in the foregoing bill, and that the matters therein stated are true, as he verily believes.

Given under my hand and notarial seal, this 27th day of December, 1879.

[SEAL.] GROSVENOR S. HUBBARD,
Notary Public, New York County.

17 EXHIBITS.

EXHIBIT A.

Deed of Trust or Mortgage.

The Chesapeake and Ohio Railroad Company to Philo C. Calhoun, William Butler Duncan, William Orton, city of New York, and Matthew F. Maury, of Virginia, trustees, dated October 1st, 1868.

This indenture, made this first day of October, one thousand eight hundred and sixty-eight, between the Chesapeake and Ohio Railroad Company, a corporation created, organized, and operated under and in pursuance of the laws of the States of Virginia and West Virginia, and herein designated party of the first part, and Philo C. Calhoun, William Butler Duncan, and William Orton, of New York city, and Matthew F. Maury, of Virginia, as trustees, and herein designated parties of the second part:

Whereas, by virtue or the laws under which the said first party was created, and of its organization, and in the exercise of its corporate rights, powers, and franchises, the said party of the first part became and is invested with all and singular the corporate rights, powers, privileges, and franchises, and likewise with the owner and and occupier of all property, real, personal, and mixed, and of all debts due, as well on stock subscriptions as other things in action, rights of way, contracts, and all and every other interest or interests whatsoever, which were held, owned, and lawfully possessed or exercised by, or which in any way or manner belonged or appertained to the Virginia Central Railroad Company, in Virginia, and to the Covington and Ohio Railroad Company, in Virginia and West Virginia, corporations created and organized under and by virtue of the laws of the said States of Virginia and West Virginia, as fully and effectually as the same rights, powers, privileges,

18 franchises, property, debts, contracts, rights of way, and other interests were held, owned, and exercised by the said last-named corporations, or either of them, at the time of the consummation of the organization of the corporation executing these presents, but subject, however, to all the then existing debts, liens, and other liabilities incurred, created, or suffered by the same

corporations, or either of them; such debts, liens, and liabilities having been legally assumed by said party in the said acts of organization.

And whereas, to enable the said party of the first part to liquidate, pay, or satisfy the said indebtedness, liens, and liabilities, and also for the purpose of obtaining money and materials necessary for completing and perfecting its line of railway, and enlarging the capacity and strengthening and shortening the line, as well as extending the operating facilities for the business thereof, the said party has, by the board of directors entrusted with the control and management of its corporate affairs, resolved to borrow money to an amount not exceeding in the aggregate the sum of ten millions of dollars, and to issue bonds for the payment or repayment thereof to the number of fifteen thousand—that is, ten thousand bonds for the sum of five hundred dollars each, and five thousand bonds for the sum of one thousand dollars each, and bearing date the first day of October, *anno Domini* one thousand eight hundred and sixty-eight, in the following form of bond and coupons:

No. —. First Mortgage Gold Bond.

In United States, $1000 gold coin. Or British £200 sterling.

The Chesapeake and Ohio Railroad Company, of Virginia and West Virginia, promises to pay to the holder of this bond, thirty years after date, for value received, the sum of one thousand dollars in United States gold coin at par, at the office of the company, in the city of Richmond, State of Virginia, or at the agency of the company in the city of New York, or, at the option of the holder of this bond, the sum of two hundred pounds sterling, at the agency of the company, in the city of London, England, and also
19 the interest thereon from date at the rate of seven per cent. per annum, payable semi-annually, in gold coin, or in sterling, as aforesaid, free of all U. S. Government tax, upon the presentation of the respective coupons hereunto annexed. This bond is one of a series of fifteen thousand, ten thousand of which are for five hundred dollars, or one hundred pounds sterling each, numbered from number one to number ten thousand, inclusive, and five thousand are for one thousand dollars, or two hundred pounds sterling each, numbered from number one to number five thousand, inclusive, amounting in the aggregate to ten millions of dollars, or two millions of pounds sterling, and all bearing even date herewith, authorized by law, and secured by a mortgage or deed of trust, dated October 1st, 1868, conveying to Philo C. Calhoun, William Butler Duncan, and William Orton, of New York city, and Matthew F. Maury, of Lexington, Virginia, the railroad and all the property, works, and franchises of the said Chesapeake and Ohio Railroad Company now owned or held, and all that may hereafter be acquired or held, in the States of Virginia and West Virginia.

In witness whereof, the said Chesapeake and Ohio Railroad Company has caused this bond to be signed by its president and treas-

urer and its corporate seal to be hereunto affixed, at Richmond, Virginia, the 1st day of October, A. D. one thousand eight hundred and sixty-eight.

[SEAL.] E. FONTAINE, *President.*
J. GARRETT, *Treasurer.*

This is to certify that the Chesapeake and Ohio Railroad Company has executed to us a deed of trust or mortgage, which is, by reference, made part of this certificate, purporting to convey its railroad property, works, and franchises now owned and hereafter to be acquired in the States of Virginia and West Virginia, in trust for the benefit of the holders of its bonds of similar tenor and date with the foregoing, in sums of five hundred dollars, or one
20 hundred pounds sterling, and one thousand dollars, or two hundred pounds sterling each, issued pursuant to a resolution of the board of directors of said railroad company, to the amount of ten millions of dollars, or two millions of pounds sterling, with power to sell said railroad property, works, and franchises in case of defaults for the space of six months in the payments of the principal or interest on any part of said bonds, or in case of the non-payment for six months of any installment required to be paid into the sinking fund provided for by said deed of trust or mortgage, on the request of the holders of twenty per cent. of said bonds then outstanding, and that the foregoing is one of the several bonds referred to in, and intended to be secured by, said deed of trust or mortgage, and that said deed of trust or mortgage has been stamped and certified by the respective clerks to have been recorded in every county through which the said railroad has been or is to be constructed or located in the States of Virginia and West Virginia.

PHILO C. CALHOUN, *Trustee.*
WILLIAM BUTLER DUNCAN, *Trustee.*
WILLIAM ORTON, *Trustee.*
MATTHEW F. MAURY, *Trustee.*

THE UNITED STATES OF AMERICA.

$35. No. — £7.

The Chesapeake and Ohio Railroad Company will pay the bearer, at his option, thirty-five dollars, in United States gold coin, at its office in the city of Richmond, State of Virginia, or at its agency in the city of New York, State of New York, or seven pounds sterling at its agency in the city of London, England, on the first day of ——, 18—, being the semi-annual interest due that day on bond No. —— for $1,000, or £200.

JOHN GARRETT, *Treasurer.*

Now, therefore, this indenture witnesseth, that the said
21 party of the first part, for the purpose of securing and making more sure and certain the payments of the sums of money mentioned and provided for in the said fifteen thousand bonds, bearing even date herewith, and each and every of them, with the interest

therein accruing, after actual issue, according to the true intent and meaning thereof, and in consideration of the recited premises, the loan of said money and the sum of one dollar to the said first party in hand paid by the said parties of the second part at and before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged by the said party of the first part, the Chesapeake and Ohio Railroad Company, the party of the first part aforesaid, has granted, bargained, sold, assigned, transferred, and conveyed, and by these presents does grant, bargain, sell, assign, transfer, and convey unto the said Philo C. Calhoun, William Butler Duncan, William Orton, and Matthew F. Maury, trustees, the parties of the second part aforesaid, to their successor or successors in the trust and assigns, all and singular the estate and property, real, personal, and mixed, and all fixtures, rights, privileges, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind held and owned or occupied by the said party of the first part, that is to say, all and singular the railroads or railways of said company, from and including the terminus and depot at Richmond, in the county of Henrico, in the State of Virginia, and thence to the mouth of Big Sandy river, on the Ohio river, including a proposed branch line from Charleston to Point Pleasant, in the State of West Virginia, together with all and singular the lands, tracks, lines, rails, bridges, ways, rights of way, and materials, buildings, piers, wharves, erections, fences, walls, fixtures, privileges, franchises, rights and interests, real estate, personal property, choses in action, leasehold, and other things of and belonging to said party of the first part of every kind, nature, and character, in either of the said States of Virginia or West Virginia, and all the tolls, income, issues, and profits to be had or derived from the
22 same, or any part or portion thereof, or from any part or portion of said term or terms, or either thereof, and all right to receive or recover the same, and all railway stations and depots, with all the appurtenances necessary or convenient for the sole, complete, and entire use and operation, as well as maintenance, of the said roads or railways owned or leased by said first party; and also all the locomotives, engines, tenders, cars, carriages, tools, and machinery belonging or appertaining to said railroads and railways so named as aforesaid, and all improvements or additions made or to be made to any or all of said properties, estates, railroads or railways, and their appurtenances, by said party of the first part or by others; also all and every other estate, interest, property, or thing which the said part of the first part own and hold, or may and shall hereafter acquire and hold, necessary or convenient for the use, occupation, operation, and enjoyment of all or any of its said railroads, railways, leases, and property, rights, privileges, and franchises, or any part or portion thereof; and also all rights and privileges to use the said road-beds, tracks, sidings, turnouts, and switches constructed at the execution of these presents, or which may and shall be hereafter constructed, for the convenient use of said railroads or railways, or any of them, owned or operated by said first party, as fully and as effectually as the said company, party

of the first part, is or may be by law entitled to have or acquire. But nothing herein contained shall be held, understood, or construed to prevent said party of the first part from selling, hypothecating, or otherwise disposing of anything received in payment of shares of capital stock, or on and for other interests, or from disposing of, by and with the consent, in writing, of the parties of the second part, any lands or other property and effects not essential or necessary to be retained for the said roadways, depots, or station grounds, nor required for the construction or convenient use of the said railways, nor from selling shares, nor from collecting moneys due on capital stock, subscriptions, or other things, or for otherwise, provided the said first party shall diligently proceed to apply all such means and proceeds to the finishing and equipping of said railway and
23 straightening and shortening the lines and other like necessary purposes thereof; and provided, also, that no default shall have been made and at the time remain in the payment of the interests or principal of any of the bonds hereby secured. But even after defaults in the payment of interests the trustees shall have full power, in their discretion, upon the written requests of the party of the first part, to convey, by way of release or otherwise, to the persons designated by the said party of the first part, any lands acquired or held for the purposes of stations, depots, shops or other buildings; and shall also have power to convey as aforesaid, on like requests, any lands or property which, in the judgment of the trustees, shall not be necessary for use in connection with the said railroad, or which may have been held for a supply of fuel, gravel or other material; and also to convey as aforesaid, on like request, any lands not occupied by the track which may become disused by reason of a change of the location of any station house, depot, shop or other building connected with said railroad, and such lands occupied by the track and adjacent to such station house, depot, shop or other buildings as the said party of the first part may deem it expedient to disuse or abandon by reason of such change, and to consent to any such change and to such other changes in the location of the track, or depot, or other buildings as shall have become expedient, and to make and deliver the conveyances necessary to carry the same into effect; but any lands which may be acquired for permanent use in substitution for any of so released, shall be conveyed to the trustees upon the trusts of these presents; and the trustees shall also have full power to allow the said party of the first part from time to time to dispose of such portions of the equipments, machinery, and implements, at any time held or acquired for the use of the said railroad as may have become unfit for such use, replacing the same by new, which shall be conveyed to the trustees or be otherwise made subject to the operation of these presents, to have and to hold the estate, property, rights, privileges, franchises and interests, to-
24 gether with all and singular the emoluments, income and advantages, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, unto the said Philo C. Calhoun, William Butler Duncan, William

Orton, and Mathew F. Maury, parties of the second part, and their successors and assigns, on the trusts and for the uses and purposes herein declared and none other, subject, however, to the special priority of lien encumbrances hereinafter limited and acknowledged; *provided* always that these presents are made and executed upon the express condition that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of the said bonds or obligations intended to be secured hereby, and each and every of them, after the same shall be issued, the principal sums of money therein respectively mentioned at the maturity thereof, according to their true intent and meaning, with the interest therein accruing at the times and in the way and manner therein provided, according to the true intent and meaning of these presents, that then, and from thenceforth, this indenture and the estate hereby granted shall cease, determine, and be utterly void and of none effect, without any release or formal reconveyance, re-entry, acknowledgment of satisfaction, or any other act whatsoever; and the said party of the first part, in consideration of the premises, hereby covenants and agrees to and with the said Philo C. Calhoun, William Butler Duncan, William Orton and Mathew F. Maury, their successor or successors in said trust, and assigns, that the said first party will, at any time or times hereafter, upon the reasonable request of the said parties of the second part, their successors or assigns, execute and deliver, or cause to be executed and delivered, all and every such further and reasonable deeds, conveyances, assignments, and assurances in the law for the better and more effectual vesting and confirming the premises hereby granted or intended so to be, and especially for conveying any property subsequently to the date hereof acquired by the said party of the first part, and comprehended in the description contained in these premises, if any such there be, which shall not enure to the use and benefit of the holders of said bonds under the terms and covenants of this indenture, to the said parties of the second part, their successors and assigns, as by them or their counsel learned in the law shall be reasonably devised, advised, or required; and further, that the said first party will do and perform all the things on the part of the said first party to be done and performed as hereinbefore set forth, and faithfully apply all the money and other things arising from the issue of said bonds to the purpose hereinbefore recited or mentioned as the objects thereof; and further, that the said first party will pay unto the holder or holders of the said bonds respectively the said principal sums of money therein respectively mentioned, and as expressed therein, and the interests therein, as the same shall become due and payable, and the money, to the trustees of the sinking fund as hereinafter provided; and further, that in case of default in payment thereof, either principal, interest, money or sinking fund secured hereby, within six months after such defaults shall have been made or suffered, the defaults still continuing, the said first party shall and will, on demand made by the parties of the second part, their successors or assigns, trustee or trustees, for the time being, or their agent or agents duly authorized in writing, assign and transfer in due form to them, or to their

agent or agents so authorized, the actual possession of all the herein granted and conveyed property and premises, and herein recited and mentioned, or intended to be embraced in this trust; and further, that the expense of taking, holding, and managing said property and premises, if possession be taken, shall be paid from the income, and, if necessary, from the sale of the property and premises by the said trustee or trustees, as the case may be, for the time being; and further, that in such case the parties of the second part, their successors in said trust, and assigns, shall and may, by themselves or their officers and agents, take and receive, collect and have
26 the income and profits of the said railways and other property—first applying the same to the payment and discharge of all current necessary operating expenses and repairs, including the expenses hereinbefore mentioned, and all taxes and other similar charges, and next to the payment of all principal and interest money as the same becomes due and payable upon the outstanding hereinafter recited prior lien bonds, according to the obligation thereof, and as required therein to be paid by the Virginia Central Railroad Company making and issuing said bonds, but not otherwise, and next to the payment of all sums of money due and payable upon the aforesaid bonds issued by said first party, and hereby secured, according to the tenor thereof; and further, that the said parties of the second part, their successors in said trust, or assigns, having entered, as hereinbefore mentioned, into the full possession of the premises, property, and estate hereby conveyed (the said default still continuing), at his or their discretion, and with the approbation of such courts of record as may have jurisdiction over like trusts in the aforesaid States, may, or on the written request of the holders of at least twenty per centum of the bonds hereby secured and then outstanding unpaid, shall proceed to sell and dispose of, or cause to be sold and disposed of, all of the premises, property, and estate hereby conveyed, or intended to be conveyed, or so much thereof as shall be necessary to pay and discharge the principal and interest, according to the tenor thereof, of all of such of said bonds hereby secured and then outstanding as may have been issued by said first party, and which then remain unpaid, together with all benefit and equity of redemption of the said party of the first part therein, by public auction, either in the city of Richmond or in the city of New York, to the highest bidder, having previously given public notice of the time, place, terms of sale, and of the specific property to be sold by publishing the same in at least two newspapers of good general circulation in each of the said cities, and wherever else the trustees may deem it expedient or required by law, for a period of at least ninety days previous to such sale, and as the attorney or attorneys of the said first party for
27 that purpose, by these presents duly constituted and appointed, make, execute, and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same, granting and assuring to said purchaser or purchasers all such estate, rights, property, and interest, and to the same extent, as the said first party had therein at the date hereof or

at any time subsequent, and also a good and sufficient transfer and assignment of said personal property, choses in action, contracts and leases; but, nevertheless, the said sale and conveyances hereby authorized shall be and leave the premises subject to the payment, according to the tenor thereof, of the hereinafter mentioned prior lien bonds which may then be outstanding and existing unpaid, to the same extent of obligation and in the same manner and with like effects only as by the said hereinafter recited prior mortgages is created and obligated, reference being severally thereunto had and made, and out of the money arising from such sale or sales to retain the costs and charges of advertisement of the said sale of the premises, and all other sums of money which said trustees of their successors in said trust may may have been obliged to pay by reason of their taking possession of and operating said premises, and a reasonable allowance for their own services and for legal professional advice, aid and assistance effecting and consummating said possession, operation and sales; and also the principal and interest which shall then remain due and unpaid on said bonds remaining issued and outstanding and hereby secured as aforesaid for the benefit of and to be paid to the holders thereof, and then restore the residue of the said proceeds to the said party of the first part; it being hereby expressly understood that the bonds issued by said first party and secured by these presents shall be ratably received in payment of said sale by said trustees or their successors, in case any such sale shall be made, at the option of the holder or holders thereof; and the said sale, when fully consummated, shall be a perpetual bar, both in law and in equity against the said party of the first part, and all persons claiming or to claim the premises, or any part
28 thereof, by, through or under said party of the first part subsequent to the date of these presents, and in no case shall any claim or advantage be taken of any valuation, appraisements or extension laws by the party of the first part, nor any injunction or stay of lawful proceedings herein, nor shall any process be applied for or obtained by the said party of the first part to prevent or obstruct such lawful entry or sale as aforesaid, but the same are hereby expressly waived by the said party of the first part. The party of the first part further agrees that at the expiration of twelve months after the completion of the railroad to the Ohio river, and every twelve months thereafter, the sum of twenty thousand pounds sterling shall be remitted to two trustees to be appointed by the bondholders, with the concurrence of the party of the first part, as a sinking fund for the redemption of the bonds secured by these presents. The trustees shall invest said moneys in the purchase of the bonds herein secured at a rate not exceeding ten per cent. above the par of the said bonds, with the accrued interest thereon, and the bonds so purchased shall be deposited in some safe depository to be agreed on by the trustee and the party of the first part, and be immediately registered, stamped or endorsed as belonging to the said sinking fund, but shall remain in force, and the interest thereon shall continue to be paid to the said party of the first part, and the amount of such interest shall be added and applied as a part of the

capital of the sinking fund hereby established; and in case the said bonds cannot be purchased at such rate within three months after the money shall have been received, then the said money shall be invested in such manner as the trustees may deem proper; *provided*, nevertheless, that it shall be at all times competent for the party of the first part and the holders of the bonds secured hereby, acting by a majority in interest, to enter into any new agreement which they may deem necessary or proper for the modification of the sinking fund hereby established or the regulation of investments under the same. It is also expressly understood and agreed by and between all parties to these presents, that of the said existing debts, liens and liabili-
29 ties to which the property, rights, franchises, and other interests aforesaid acquired are subject, there are prior liens created by the Virginia Central Railroad Company by mortgage of all the line of its railway, franchises, property, and appurtenances from the terminus thereof in the city of Richmond to the junction of the same with the line of railroad of the Covington and Ohio Railroad Company, in Virginia, at Covington, in Allegheny county, to secure the payment of the bonds therein mentioned, and amounting in the aggregate to fourteen hundred and forty-seven thousand sixty-three dollars and eighty-seven cents, and certain unsecured bonds and other debt created by the said Virginia Central Railroad Company, amounting in the aggregate to about five hundred thousand dollars. It is furthermore expressly understood and agreed by and between all of the parties hereto, that of the said fifteen thousand bonds secured or designed to be secured by these presents, four thousand in number, of five hundred dollars or one hundred pounds sterling each, and numbered therein from one to four thousand inclusive, amounting in the aggregate to the sum of two million dollars, shall be placed in the keeping or custody of John Stewart and Jaqueline P. Taylor, as commissioners for that purpose constituted, and so remain in trust and not used or withdrawn except as authorized and directed by resolutions of the directors of the Chesapeake and Ohio Railroad Company, and then only for the purpose of discharging the above-mentioned outstanding prior lien bonds and interest and other indebtedness of the Virginia Central Railroad Company; in the event of the bonds amounting to two million dollars being more than sufficient to pay off and cancel the present bonded and floating debt of the Virginia Central Railroad Company, the surplus bonds, if any, to be sold for the benefit of the Chesapeake and Ohio Railroad Company.

And this indenture further witnesseth, that these presents, and the said bonds hereby secured or intended so to be, are made, executed, and issued or delivered upon the terms, conditions, and agreements following, that is to say:

30 First. That the actual possession, use, management, and control of all the hereinbefore granted estate, property, and premises shall be and remain in and with the said party of the first part so long as the bonds so issued shall be and remain without default or forfeiture.

Second. That in the case of any vacancy in the said trusteeship by the incapacity to act, death or resignation of either of the said trustees or from any other cause, all his estate, rights, interest, power, and control shall be thereupon divested and cease and determine, but without destroying or without any discontinuance of the trusts; and the said party of the first part shall, upon default or omission to take proceedings therefor for thirty days after notice of such vacancy or incapacity, the holders of not less than ten per centum in amount of the said bonds hereby secured may apply to any of the courts having jurisdiction in the States of Virginia or West Virginia to appoint a new trustee or trustees to supply the vacancy, and such proceedings may be had and appointments made as often as the like occasion may require the appointment of a trustee to execute the trust herein declared, and when so appointed such new trustee shall thereupon become vested for the purposes of the said trust, with all the estate, rights, interests, power, property, and control hereby conveyed or granted to or vested in the said Philo C. Calhoun, William Butler Duncan, William Orton, and Mathew F. Maury by these presents without any further assurance, grant, or conveyance of the same, as fully and effectually as if such assignment had been originally made herein; but if the same shall be necessary, both the said party of the first part and such new trustee, or either of them, shall make, execute, and deliver all necessary conveyance and agreements and grants and powers and authorities for that purpose. And it is further understood and agreed by and and between the parties *of* these presents, that the said parties of the second part, their successor or successors in said trust, shall only be accountable for reasonable diligence in the manage-
31 ment thereof, and shall not be responsible for the acts or negligencies of any agent or agents necessarily employed by them when such agent or agents are selected with proper discretion or with approbation of the said party of the first part; and the officers of the said railroad company shall have at all times the right to inspect the books kept by the receivers of the road and their agents.

And this indenture further witnesseth, that the said parties of the second part hereby accepts the aforesaid trusts, and also covenant and agree to and with the said party of the first part to execute the same upon the terms and conditions hereinbefore as well as hereinafter mentioned and provided, and which said terms and conditions are hereby mutually agreed to and upon by both of the parties to these presents, and that the said trustees and their successors may employ and advise with legal counsel, and that the expense thereof, as well as other personal expenses of the said trustees for the time being in the discharge of said trusts and all others, their reasonable and proper charges and expenses thereof, including their compensation, shall be paid by the party of the fiart as they are incurred, or otherwise, out of the trust, estate, or income on which or to which they are chargeable, and likewise that the said trustees, or their successors, shall not be required to act in the execution of said trusts, except at their own option, unless the party requesting them so to do shall furnish them reasonable indemnity against the loss, costs,

trouble, and expense they may incur or be at in so doing, and that when called upon to act, they shall be, and are hereby, authorized and invested with full power, at their option, under advice of legal counsel, to submit all questions of law or fact arising in the execution thereof to arbitrators; that they, in the execution of the said trusts, may employ agents or attorneys-in-fact to act in their behalf whenever required to act as aforesaid, except when they may be or are required by law to act personally; and also all the covenants and agreements hereinbefore contained or implied may
32 be executed specifically by and through any of the said courts of competent jurisdiction, as practiced by them in like cases of trusts.

It is further understood that any three of the four trustees aforesaid, or their successors, shall be *sufficient* for carrying into effect the purpose of this trust.

In testimony whereof, the said party of the first part, in pursuance of authority given by law, and in conformity with the order of the board of directors, has caused this indenture to be signed by Edmund Fontaine, its president, and John Garrett, treasurer, and the corporate seal of the company affixed thereto, and the party of the second part have hereunto subscribed their names and affixed their seals the day and year first in this indenture written.

THE CHESAPEAKE AND OHIO RAILROAD COMPANY,

A copy: (Signed) By E. FONTAINE, *President.*
J. GARRETT, *Treasurer.*

(Signed) P. C. CALHOUN. [SEAL.]
W. BUTLER DUNCAN. [SEAL.]
WILL'M ORTON. [SEAL.]
M. F. MAURY. [SEAL.]

Signed, sealed, and delivered in the presence of—
(Signed) C. J. F. NETHERLAND,
E. M. GARNETT,
As to Matthew F. Maury.
THOS. L. BROWN,
JNO. McGINNESS, JR.,
As to Philo C. Calhoun, Wm. Butler, Duncan, William Orton.

STATE OF VIRGINIA, }
City of Richmond, } *ss:*

On the 24th day of October, one thousand eight hundred
33 and sixty-eight, before me personally came Edmund Fontaine, president, and John Garrett, treasurer of the Chesapeake and Ohio Railroad Company, to me personally known, who being by me duly sworn, did depose and say that they reside in the city of Richmond, in the State of Virginia; that he, Edmund Fontaine, is the president of the Chesapeake and Ohio Railroad Company, and that he, John Garrett, is the treasurer of the Chesapeake and Ohio Railroad Company; that they knew the corporate seal of said company;

that the seal affixed to the foregoing instrument of writing is such corporate seal; that it was so affixed by order of the board of directors of said company, and that they signed their names thereto by like order as president and treasurer of the said company; and on the same day also personally appeared before me Matthew F. Maury, one of the trustees, known to me to be the individual described in and who executed the foregoing instrument of writing, who acknowledged to me that he had executed the same.

(Signed) C. J. F. NETHERLAND,
Notary Public in and for the City of Richmond, State of Virginia.

STATE OF VIRGINIA, }
City of Richmond, } *ss:*

Court of the city of Richmond, the same being a court of record, do hereby certify, that C. J. F. Netherland, whose name is subscribed to the certificate of the proof of acknowledgment of the annexed instrument and therein written, was, at the time of taking such proof of acknowledgment, a notary public in and for the city of Richmond, dwelling in said city, commissioned and sworn and duly authorized to take the same; and further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature of the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of Virginia.

34 In testimony whereof, I have hereunto set my hand and affixed the seal of the said court.

(Signed) RO. HOWARD, *Clerk.*

STATE OF VIRGINIA, }
City of Richmond, } *ss:*

Be it remembered that on this 24th day of October, A. D. one thousand eight hundred and sixty-eight, before me, Edgar M. Garnett, a commissioner of the State of West Virginia, duly appointed and qualified according to the laws thereof to take acknowledgments, etc., to be used and received therein, personally appeared the foregoing named Edmund Fontaine, president of the Chesapeake and Ohio Railroad Company, and being duly sworn, deposeth and saith that he was personally present at the execution of the above written instrument of writing, and saw the common seal of the said Chesapeake and Ohio Railroad Company duly affixed thereto, and that the seal so affixed thereto is the common and corporate seal of the said The Chesapeake and Ohio Railroad Company, and that the above written instrument of writing was duly sealed and delivered by and as and for the act and deed of the said The Chesapeake and Ohio Railroad Company, for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to the said instrument as president of the said corporation in attestation of the due execution and delivery of the said instrument, is of this deponent's own proper handwriting. And on the same day personally appeared the foregoing named John Garrett, treasurer, and Matthew T. Maury, trustee, who in due form of law acknowl-

edged the foregoing instrument of writing by them signed to be their act and deed, and desired that the same might be recorded as such.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

(Signed) E. M. GARNETT,
Commissioner for West Virginia in Virginia.

35 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this 23d day of October, one thousand eight hundred and sixty-eight, before me, George H. Stan, a notary public of the State of New York, duly commissioned and sworn, and dwelling in said city and county of New York, personally appeared Philo C. Calhoun, William Butler Duncan and William Orton, who are personally known to me to be the said persons whose names are subscribed to the foregoing indenture or instrument as trustees therein named, and severally acknowledged the signing and sealing of the foregoing indenture or instrument to be their voluntary act and deed for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, this 23d day of October, 1868.

(Signed) GEORGE H. STAN,
Notary Public in and for the City and County of New York.

UNITED STATES INTERNAL REVENUE
COLLECTOR'S OFFICE, 3D DIS. VIRGINIA,
RICHMOND, VA., *October* 26, 1868.

I hereby certify that the foregoing instrument of writing is one of twenty—one of the same tenor in every respect—on the first of which the necessary internal revenue stamps have been affixed and canceled as required by law. This instrument of writing may, therefore, be recorded by the clerk of any court to whom it may be properly presented for that purpose, the stamps having been affixed to that numbered one.

Witness my seal of office:

(Signed) JOHN E. MULFORD,
Collector 3d District, Virginia.

36 STATE OF WEST VIRGINIA, *ss:*

KANAWHA COUNTY RECORDER'S OFFICE, *October* 30*th*, 1868.

This mortgage deed, together with the certificates thereunto annexed, was this day presented to me in said office, and thereupon, the same being duly stamped, is admitted to record.

(Signed) Teste: JOHN SLACK, *Recorder.*
Copy. Teste: JOHN SLACK, *Recorder.*
Copy. Teste: HAMILTON MORRIS,
Clerk Kanawha County Court.

CHES. & OHIO RAILWAY CO. *vs.* JOS. S. MILLER, Auditor, &c.

Exhibit "B."

A copy. Teste: SAM'L B. McCULLOCH, *Clerk.*

EXHIBIT B.

This indenture, made and entered into this fifteenth day of January, in the year one thousand eight hundred and seventy, by and between The Chesapeake and Ohio Railroad Company, a railroad corporation created by and under the laws of the States of Virginia and West Virginia, parties hereto of the first part, and William Butler Duncan and Philo C. Calhoun, of the City of New York, parties of the second part, witnesseth:

That the said Chesapeake and Ohio Railroad Company, parties of the first part hereto, in consideration of the sum of one dollar to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, assigned, transferred, conveyed and confirmed, and by these presents do grant, bargain sell, alien,
37 assign, transfer, convey and confirm unto the said parties of the second part, and to their successors, duly appointed for the execution of the trusts herein set forth, and to their assigns, the following property, part of which is now constructed, and part to be hereafter constructed, purchased, acquired, held, possessed, and owned by the said company, to wit, all that portion of the railroad and the railroad line of the said company, from and including the terminus and depot at Richmond, in the State of Virginia, and thence to the mouth of the Big Sandy river, on the Ohio river, in the State of West Virginia, including all of said line of railroad now completed and in process of construction, as well as that portion of the same which may hereafter be constructed or completed, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, workshops, machine shops, buildings, bridges, tools, machinery, side tracks, turn-outs, turn-tables, weighing scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all other property which is necessarily or ordinarily used in operating the said railroad, and all rights and privileges of way and transit, and all other rights and privileges which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company, and pertaining to the said line of railroad, and all corporate rights, privileges, and franchises of said company, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim, and demand in law and in equity of the said parties of the first part of, in and to the same, and every part and parcel thereof—

To have and to hold the above-granted and described premises, property, and franchises, with the appurtenances, unto the said parties of the second part, and to the survivor of them, and to their successors duly appointed.

38 But it is to be understood, and it is hereby expressly agreed and declared, that this conveyance is made and accepted for

the purposes, upon the trusts, and subject to the limitations and conditions following; that is to say:

1. The said Chesapeake and Ohio Railroad Company propose to make and negotiate a loan of fifteen millions of dollars to complete and pay for the construction and equipment of their road, and to that end have caused to be prepared, and intend to execute and negotiate by sale or otherwise twenty-one thousand five hundred bonds, numbered in one series in succession from one to twenty-one thousand five hundred, inclusive; whereof the first five thousand are for one hundred dollars each; the next four thousand are for five hundred dollars each; and the remaining twelve thousand five hundred are for one thousand dollars each, making in the aggregate the said sum of fifteen millions of dollars.

The said bonds differing only as to numbers and amounts, according to the classification above described, are in all other respects of the following form:

United States $1,000 gold coin. United States $1,000 gold coin.

First Mortgage Bond.

The Chesapeake and Ohio Railroad Company, of Virginia and West Virginia, promise to pay to Fisk & Hatch, or bearer, for value received, one thousand dollars in gold coin of the United States of America, in the city of New York, on the first day of November, in the year one thousand eight hundred and ninety-nine, with interest thereon at the rate of six per centum per annum from the first day of November, one thousand eight hundred and sixty-nine, payable semi-annually, on the first day of May and November in each year, in the city of New York, on presentation and surrender of the respective coupons hereto annexed, both principal and interest payable in United States gold coin, at par, dollar for dollar.

This bond is one of a series of twenty-one thousand five hundred bonds, five thousand of which are for one hundred
39 dollars each, numbered respectively from number one to number five thousand, inclusive, four thousand of which are for five hundred dollars each, numbered respectively from number five thousand and one to number nine thousand, inclusive, and twelve thousand five hundred of which are for one thousand dollars each, numbered respectively from number nine thousand and one to number twenty-one thousand five hundred, inclusive. Said bonds amounting in the aggregate to fifteen millions of dollars, all bearing even date herewith, authorized by law, and secured by a mortgage or deed of trust, bearing even date with said bonds, duly executed by said company to William Butler Duncan and Philo C. Calhoun, of New York, as trustees, upon the whole of their railroad line in the States of Virginia and West Virginia, from the city of Richmond, Virginia, to the Ohio river, in West Virginia, with all the rolling stock, stations, fixtures, and franchises thereof, and appurtenances thereto, now owned or held, and all that may be hereafter acquired for the use of the said company.

In witness whereof, the Chesapeake and Ohio Railroad Company

have caused their corporate seal to be hereunto affixed and these presents to be signed by their president and treasurer, this fifteenth day of January, in the year one thousand eight hundred and seventy.

[SEAL.] C. P. HUNTINGTON, *President.*
JAMES J. TRACY, *Treasurer.*

[U. S. Internal Revenue stamp for one dollar.]

Upon each bond is endorsed the following memorandum:

This bond, with the coupons thereon, shall pass by delivery, except that any holder thereof may, at his option, produce said bond at the office of the company, in the city of New York, or at such other places as the company may select, and cause the bond (but not the coupons) to be registered, in his name, on the books of the company. A certificate of such registration, and of each transfer thereafter, shall be endorsed on the bond by the transfer agent of the company. After such registration the bond shall be transferable only on the books of the company, unless the last transfer be to bearer, after which it shall again be transferable by delivery, and it shall continue subject to successive registrations and transfers at the option of the holder. On a registration of ownership the holder may, at his option, surrender all the coupons which shall then be cancelled, and thereafter it shall remain a registered bond, transferable only on the books of the company, and the interest thereon shall thereafter be paid to the registered owner. Registrations, transfers, and receipts of interest may be in person or by attorney.

JAMES J. TRACY, *Secretary.*

On each of the bonds are endorsed the following blank memoranda of registration and transfer:

Registered on the books of the company to ———,	Transferred on the books of the company to ———,
——, 18—.	——, 18—.
———, *Transfer Agent.*	———, *Transfer Agent.*

And also a certificate to be signed by the trustees in the following form:

We hereby certify that the within bond is one of the series of bonds secured by the mortgage or deed of trust described therein, and delivered to us as trustees, which has been duly recorded in the proper counties of Virginia and West Virginia.

——— ———,
——— ———,
——— ———,
Trustees.

And to each of said bonds are attached sixty coupons for semi-annual interest, numbered from one to sixty, inclusive, which
41 coupons, different in amount and other points of description to suit the bonds to which they belong, are in the following form:

The Chesapeake and Ohio Railroad Company.

($30.) Coupon ($30.)

for

Thirty Dollars.

Interest due ——— ———, in U. S. gold coin, on bond No. ———, payable in the City of New York.

No. ——. JAMES J. TRACY, *Secretary.*

Now, to provide a full, fair, and available security for the principal and interest of the said fifteen million loan, and to assure to those who may invest therein the payment of the principal money represented by the said bonds, and of the interest thereon in all respects, according to the true intent and meaning thereof, is the chief and leading purpose of this conveyance. In furtherance whereof, it is hereby agreed and declared—

II. That at the expiration of one year from the completion of the said Chesapeake and Ohio Railroad, so as to be opened for business between Richmond and the Ohio river, the said Chesapeake and Ohio Railroad Company will set apart from the net earnings and income of the said railroad the sum of one hundred thousand dollars, and at the expiration of each and every year thereafter a like sum of one hundred thousand dollars, as a sinking fund, for the payment of the principal money of the said fifteen million loan represented by the said bonds, which fund, with the interest accruing thereon, is hereby pledged to the holders of the said bonds for the final payment and redemption thereof, and shall be exclusively applied from time to time as may be found most expedient to the purchase, payment and redemption of the said bonds, or such of them as can be so purchased, paid, or redeemed, until the whole loan shall be fully paid.

42 III. That if the said parties of the first part, or their successors, shall well and truly pay or cause or procure to be paid unto the holders, from time to time, of said bonds, and each and every of them, the said sum of money secured to be paid by the said bonds, and the interest thereon, at the places and times, and in the manner set forth in the said bonds, according to the true intent and meaning thereof, then these presents, and all the property, estates, rights, franchises, privileges herein and hereby granted and conveyed, shall cease, determine, and be void.

IV. That until default shall have been made by the parties of the first part, in payment of the principal or interest of said bonds, or some of them, or until default shall have been made in respect

to something herein agreed or required to be done by them, the said parties of the first part shall be permitted to possess, use, occupy, manage, and operate the said railroad property, franchises and appurtenances, and to renew, replace and repair the same, and every part thereof, and take, receive and use the tolls, rents, issues, incomes, and profits thereof, and apply the same to the payment of the current expenses of the road, and to the purchase of necessary machinery and equipment, or dispose of the same for the lawful uses of the company in any manner not inconsistent with this indenture. And the board of directors of said company may likewise distribute and pay any net annual incomes to stockholders after paying the interest on any and all bonds which said company may owe.

V. But if default shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest, or any part thereof, and if the same shall remain unpaid for the period of six months from and after the time when the same should have been paid, according to the terms of said bonds, then the said parties of the second part, or either of them, upon the refusal of the other, or their successors in said trust, by themselves, or their agents or servants in that behalf, may, upon request of the holder or holders of not less than one million of dollars of said bonds,
43 on which the interest or principal shall so be and have remained in default as aforesaid, enter into and upon, and take possession of all, or, in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroad, and receive the income, receipts and profits thereof, and out of the same—

First. Pay the expenses of running and operating the same, including therein such reasonable compensation as they or he may allow to the several persons employed or engaged in running and superintendence of the same, and all taxes, assessments, charges, or liens having priority or preference to the lien of these presents upon the said premises, or any part thereof, and a reasonable compensation to the parties of the second part, or their successors, or such of them as shall act in the premises, for their or his care, diligence, and responsibility in the premises, and for the services of such attorneys and counsel as may have been by him or them employed, and also the expenses of keeping the said road and appurtenances, the locomotives and the rolling-stock thereof, in good and sufficient repair, to prevent deterioration in the values thereof, and all other reasonable and proper charges and expenses of the care and management thereof; and

Second. Pay, as far the same will suffice, all interest on the said bonds in the order in which such interest shall become due ratably; and after paying all interest which shall have become due, to apply the said moneys to the payment of the principal of such of said bonds as may be at that time unpaid, ratably and without discrimination or preference; and if, after satisfaction thereof, a surplus shall remain, to pay over such surplus to the said company, their successors, or assigns, or as any court of competent jurisdiction shall order and direct.

VI. Or, in case default shall be made as aforesaid, and continue as aforesaid, it shall likewise be lawful for the said trustees, or the survivor of them, or their successors, after entry as aforesaid, or without entry, personally, or by his or their attorneys or
44 agents, to sell and dispose of all and singular the railroad, lands, rights, property, privileges, franchises (real and personal), and other premises hereby conveyed, or intended so to be, with the appurtenances, or so much thereof as may be necessary, at public auction, at the city of New York, to the highest bidder, at such time as the said trustees, or the survivor of them, or their successors, shall designate, having first given notice of the time and place of such sale by advertisement, published not less than once a week for eight weeks, successively, in one or more newspapers published in the city of New York, in Richmond, Virginia, and in Charleston, West Virginia, and to adjourn the said sale from time to time, in their or his discretion; and if so adjourned, to make the sale without further notice, at the time and place to which the same may be so adjourned, and to make, execute, and deliver to the purchaser or purchasers of the said premises good and sufficient deed or deeds, in fee-simple, assignments, or other transfers in the law, for the same; which sale, made as aforesaid, shall be a perpetual bar, both in law and equity, against the said parties of the first part, their successors, and assigns, and all other persons claiming or to claim the said premises, or any part or parcel thereof, by, from, through, or under the said parties of the first part, their successors, or assigns; and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorney and counsel fees, and all other expenses, advances, or liabilities which may have been made or incurred by the said trustees in respect to the said lands or property, or any part or parcel thereof, or in operating or maintaining the said railroad, or any part thereof, or in managing the business thereof while in their or his possession, and in preparing for and completing the sale as aforesaid, or in the performance of any of the trusts herein contained, and all payments which may have been made by him or them for taxes or assessments, and for charges or liens prior to the lien of these presents on the said premises, or any part thereof, together with a reasonable compensation for his or their own services in the execution
45 of this trust, to be fixed by any court of competent jurisdiction, but not exceeding twenty-five thousand dollars, to apply the remaining proceeds of said sale to the payment of the interest which shall at that time have accrued on said bonds secured by these presents, or so many of them as shall have been issued by said parties of the first part, and be then outstanding, *pro rata*, until all of such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds *pro rata*, until such principal shall be paid; and if, after payment of said principal and interest in full, there shall remain any surplus, to pay over such surplus to the said parties of the first part, their successors or assigns, or to such person or persons as may be ordered or directed by any court of competent jurisdiction.

And the parties of the first part do hereby declare and agree that the receipt of the trustees, or such of them as shall make the sale aforesaid, shall be a full and sufficient discharge to the purchaser or purchasers of the premises to be sold as aforesaid; and that said purchasers, having paid said purchase money, shall not be liable to see to the application thereof to or upon the trusts herein contained, or be answerable for any loss or misapplication or non-application of such purchase money, or of any part thereof, or be obliged to inquire into the necessity, propriety, or authority of or for any such sale.

VII. At any sale of the aforesaid property, or any part thereof, whether made under and by virtue of the power hereby granted or by judicial authority, such sale may be either for cash or on such time or upon such terms as the trustees shall deem best for the interest of all parties, but the bonds issued by the parties of the first part, and hereby secured, shall be ratably received as cash in payment from any purchaser or purchasers by the said trustees, or their successors, at the option of the holders thereof.

VIII. And the said parties of the first part hereby agree and covenant to and with the said parties of the second part and their successors in said trust that they will pay all ordinary and
46 extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby conveyed, and every part thereof, and the said parties of the second part, the survivor of them, or their successors in said trust, or any one or more of the holders of said bonds may, in case of the default of the said parties of the first part in this behalf, pay and discharge the same, and any other lien or incumbrance upon said property which may in any way, either in law or equity, be or become in effect a charge or lien thereon prior to these presents, or to which this mortgage may be subject or subordinate, and for all payments thus made, the parties so making the same shall be allowed interest thereon at the rate of seven per cent. per annum, and such payments, with the interest thereon, shall be and are hereby secured to them by these presents, and the same shall be payable by said parties of the first part to said parties of the second part in trust for the party or parties paying the same upon demand, and may be paid out of the proceeds of the sale of said property and franchises, as hereinbefore provided.

IX. And the said trustees shall also, in their discretion, have full power to convey or release, upon the written request of the said Chesapeake and Ohio Railroad Company, any lands acquired or held for the purposes of stations, shops, or other buildings, and shall also have power to convey or release as aforesaid any lands or property which shall not be necessary for use in connection with said railroad, or which may have been held for a supply of fuel, gravel, or other materials, and also to convey or release as aforesaid on like request any lands not occupied by the track which may become disused by reason of a change in the location of the track or any station house, depot, or other adjacent building connected with the said railroad, or any part thereof, and such lands not occupied by the

track and adjacent to such station house, depot, shop, or other building as the said company may deem expedient to disuse or abandon by reason of such change, and to consent to any
47 such change, and to such other changes in the location of the track or depot or other buildings as in their judgment have become expedient, and to make and deliver the instruments or conveyances necessary or proper to carry the same into effect; but any lands which may be acquired for permanent use in substitution for those so released shall be conveyed to the said trustees upon the trusts of these presents; and the said company shall have full power, from time to time, to dispose of, according to their discretion, such portions of the equipment, machinery, and implements at any time held or acquired for the use of the said railroad as may become unfit for use, or for any reason desirable to be changed, replacing the same by others, which shall be subject to the lien and operation of these presents.

X. It shall be the duty of the trustees to exercise the power of entry or the power of sale hereby granted, or both, or to proceed, by suit or suits at law or in equity, to enforce the rights of the bondholders in case of default herein specified, in the manner and subject to the qualifications herein expressed, upon the requisition of the bondholders herein required, as follows:

First. If the default be in the non-payment of interest or principal of any of the said bonds, upon the written requisition of any holder or holders of not less than one million of dollars of said bonds, and a proper indemnification by such holder or holders to the trustees against the costs and expenses to be by them incurred, it shall be the duty of the trustees to enforce the rights of the bondholders under these presents by entry or sale under the power herein contained, or both, or by suit or suits at law or in equity, as they, being advised by counsel learned in the law, shall be deemed most expedient for the interest of the bondholders; or,

Second. If the default be in the omission of any act or thing required by these presents for further assuring the title of the trustees to any property or franchises now possessed or hereafter acquired, or in the omission to comply with any provision of these
48 presents to be observed, kept, or performed by the said company, then, and in either of such cases, the trustees may, in their discretion, enforce, and upon the requisition as aforesaid of a majority in interest of the holders of the bonds hereby secured, it shall be their duty to enforce, the rights of the bondholders by reason of such default, the said trustees being indemnified by the bondholders against costs and expenses, subject to the power hereby declared in any of the above cases of a majority in interest of the holders of the said bonds, by requisition in writing, under their hands and seals, to instruct the said trustees to waive such default upon the actual payment of the interest in arrear, with the interest thereon, or other compliance with the provisions herein contained, and payment of the expenses incurred by reason of such default, or upon adequate indemnity as aforesaid, to enforce the rights of the bondholders by reason thereof: *Provided*, That no action of the said

trustees or bondholders, or both, in waiving such default or otherwise, shall extend or be deemed to affect any subsequent default, or to impair the rights resulting therefrom.

XI. It is mutually understood and agreed, by and between the parties hereto, that the word "trustees," as used in these presents, shall be construed to mean the trustees or trustee for the time being, whether original or new, and whenever a vacancy shall exist, to mean the surviving or continuing trustee, and such trustee shall, during such vacancy, be competent to exercise all the powers by these presents granted or conferred upon the parties of the second part; and it is also mutually agreed that the said trustees shall be entitled to just compensation for all services which they may hereafter render in their trust, to be paid by said company or out of the income of the property, and for that purpose may at any time apply to the courts without notice to any person except the said parties of the first part, their successors, or assigns; that either of said trustees, or any successor, may resign or discharge himself of the trust hereby created by notice in writing to the said company and to the existing trustee, if there be such, three months before such resignation shall take effect, or such shorter notice as they may ac-
49 cept as adequate notice, and upon due execution of the conveyances hereinafter required. And in case either of said trustees, or any trustee hereafter appointed, shall die or resign, or become incapable or unfit to act in the said trust, a successor or successors to such trustee or trustees shall be appointed by the surviving or continuing trustee, with consent of the said company, and the trustee or trustees so appointed, with the surviving or continuing trustee, shall thereupon become vested with all the powers, authority, and estates granted to or conferred upon the parties of the second part by these presents, and all the rights and interests requisite to enable them or him to execute the purposes of this trust without any further assurance or conveyance so far as such effect may be lawful; but the surviving or continuing trustee shall immediately execute all such conveyances and other instruments as may be suitable or expedient for the purpose of assuring the legal estate in the premises jointly with himself to the trustee so appointed, and upon the resignation or removal by any court of competent jurisdiction of any trustee, or an appointment in his place in pursuance of these presents, all his power and authority by virtue hereof shall cease, and all the estate, right, title, and interest in the said premises of any trustee so resigning or being removed, shall, if there be a co-trustee surviving or continuing in office, wholly cease and determine, but the said trustee so resigning or being removed shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee jointly with the continuing trustee and upon the trusts herein expressed, all the property, rights, and franchises which may be at that time held upon the said trusts: *Provided*, nevertheless, and it is hereby declared and agreed that in case it shall at any time hereafter prove impracticable after reasonable exertion to appoint in the manner hereinbefore provided a successor to fill any vacancy

which may have happened in said trust, application in behalf of the holders of the bonds secured hereby may be made by the surviving or continuing trustee, or if there be no trustee, by holders of the bonds secured hereby to the aggregate amount of one hundred thousand dollars to any court of competent jurisdiction for the appointment of a new trustee, or new trustees, and the trustee or trustees when so appointed shall become vested with all the powers, authorities, and estates granted to or conferred upon the parties of the second part by these presents.

XII. And the said parties of the first part, for themselves, their successors and assigns, in consideration of the premises, and of one dollar to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hereby covenant and agree to and with the said parties of the second part, and the survivor of them and their successors and assigns, that whenever and as often as the said parties of the first part, their successors or assigns, shall acquire any lands, equipment, or other property or thing of whatever name or nature for use in connection with the said railroad between the points aforesaid, or any part thereof, the said parties of the first part, their successors and assigns, shall and will acquire, possess, and hold the same and every part and parcel thereof upon and subject to the trusts of this indenture until conveyance thereof shall be duly made and delivered to the said parties of the second part, or the survivor of them, or their successors in said trust, pursuant to the next mentioned covenant.

XIII. And the said parties of the second part, for themselves, their successors and assigns, for the consideration aforesaid, further covenant and agree to and with the said parties of the second part, and the survivor of them, their successors and assigns, that the said parties of the first part, their successors and assigns, shall and will from time to time, and at all times hereafter, and as often as thereunto requested by the trustees under this indenture, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law for the better assuring unto the said parties of the second part, the survivor of them, and their successors in said trust, upon the trusts herein expressed, the said railroad between the points aforesaid, together with all the appurtenances, franchises and property hereinbefore mentioned and appertaining thereto, and to which the said company are or may hereafter for any reason become entitled, or which they, their successors or assigns, may in manner acquire for use between the points aforesaid, as by the said trustees, or their counsel learned in the law shall be reasonably advised or require.

XIV. And it is also mutually understood and agreed between the parties hereto that the said parties of the second part, and the survivor of them, and their successors in said trust, shall be accountable, liable, or responsible for reasonable care and diligence only in the performance of the trusts hereby created, and in the management of the said estate and property in like manner as a bailee, without reward, and shall not be liable, accountable, or responsible for the acts of any agent, depository, or substitute employed by him

or them, when such agent, depository, or substitute shall have been selected with reasonable discretion, and that neither of the said trustees shall be in any manner responsible for any default or misconduct of the other.

And the said parties of the second part hereby accept the trusts created and declared by this indenture, and agree to discharge the same pursuant to the provisions in that behalf herein contained.

In witness whereof, the said Chesapeake and Ohio Railroad Company have caused their corporate seal to be hereunto affixed and these presents to be signed by their president and treasurer, and the said parties of the second part have hereunto set their hands and seals, the day and year first above written.

[SEAL.] THE CHESAPEAKE AND OHIO RAILROAD COMPANY,
By C. P. HUNTINGTON, *President.*
JAMES J. TRACY, *Treasurer.*
WM. BUTLER DUNCAN, [L. S.]
P. C. CALHOUN, *Trustees.* [L. S.]

Signed, sealed, and delivered in the presence of—
JOHN HILLHOUSE.
CHARLES NETTLETON.

52 STATE OF NEW YORK, }
City and County of New York, } *ss.:*

I, Charles Nettleton, a commissioner appointed by the Governor of the State of Virginia for the State of New York, do certify that C. P. Huntington, the president of the Chesapeake and Ohio Railroad Company, and James J. Tracy, the treasurer of the same company, whose names are signed to the foregoing writing or instrument, bearing date on the 15th day of January, A. D. 1870, as such president and treasurer, this day appeared before me in person, in my State aforesaid, and being by me duly sworn, did each depose and say that he, said C. P. Huntington, was the president of The Chesapeake and Ohio Railroad Company, and that he, said James J. Tracy, was the treasurer of the same company; that he, said C. P. Huntington, resided in the city of New York, in the county of New York, and State of New York; that he, said James J. Tracy, resided in the same city of New York; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of directors of said company, and that they severally signed their names thereto by the like order as president and treasurer of said company, respectively; and they, the said C. P. Huntington and James J. Tracy, also severally acknowledged to me that they executed the same as the act and deed of the said Chesapeake and Ohio Railroad Company. And I do further certify that William Butler Duncan and Philo C. Calhoun, whose names are signed to the writing or instrument above bearing date on the 15th day of January, 1870, have severally acknowledged the same before me in my State aforesaid.

Given under my hand and official seal, at said city of New York, this 15th day of January, A. D. 1870.

[SEAL.] CHARLES NETTLETON,
Commissioner for Virginia in New York.

53 STATE OF NEW YORK, } *ss:*
City and County of New York, }

I, Charles Nettleton, a commissioner appointed by the Governor of the State of West Virginia for the State of New York, do certify that C. P. Huntington, the president of the Chesapeake and Ohio Railroad Company, and James J. Tracy, the treasurer of the same company, whose names are signed to the foregoing writing or instrument, bearing date on the fifteenth day of January, A. D. 1870, as such president and treasurer, this day appeared before me in person, in my state aforesaid, and being by me duly sworn, did each depose and say that he, said C. P. Huntington, was the president of the Chesapeake and Ohio Railroad Company, and that he, said James J. Tracy, was the treasurer of the same company; that he, said C. P. Huntington, resided in the city of New York, in the county of New York and State of New York; that he, said James J. Tracy, resided in the same city of New York; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of directors of said company, and that they severally signed their names thereto by the like order as president and treasurer of said company, respectively; and they, the said C. P. Huntington and James J. Tracy, also severally acknowledged to me that they executed the same as the act and deed of the said Chesapeake and Ohio Railroad Company. And I do further certify that William Butler Duncan and Philo C. Calhoun, whose names are signed to the writing or instrument above, bearing date on the 15th day of January, 1870, have severally acknowledged the same before me in my State aforesaid.

Given under my hand and official seal, at said city of New York, this 15th day of January, A. D. 1870.

[SEAL.] CHARLES NETTLETON,
Commissioner of West Virginia in New York.

54 KANAWHA COUNTY RECORDER'S OFFICE,
26 *Jan'y*, 1870.

This deed of trust or mortgage, together with the certificates of acknowledgment thereto annexed, from the Chesapeake and Ohio Railroad Company to Wm. B. Duncan and Philo C. Calhoun, trustees, was this day presented to me in this office (without being stamped), and is upon said certificate admitted to record.

Teste: A. CUNNINGHAM, *Rec'r.*

A copy. Teste: HAMILTON MORRIS,
Clerk Kanawha C'ty Court.

CHES. & OHIO RAILWAY CO. *vs.* JOSEPH S. MILLER, Auditor, &c.

"Exhibit C."

A copy. Teste: SAM'L B. McCOLLOCH, *Clerk.*

Exhibit C.

The Chesapeake and Ohio Railroad Company to Philo C. Calhoun and William K. Kitchen.

Deed of trust or mortgage to secure 7 per cent. bonds. Dated October 1st, 1872.

New York: Evening Post Steam Presses, 41 Nassau street, corner Liberty. 1873.

This indenture, made and entered into this first day of October, in the year one thousand eight hundred and seventy-two, by and between The Chesapeake and Ohio Railroad Company, a railroad corporation created by and under the laws of the States of Virginia and West Virginia, parties hereto of the first part, and Philo C. Calhoun and William K. Kitchen, of the city of New York, parties of the second part, witnesseth:

That the said The Chesapeake and Ohio Railroad Company, parties of the first part hereto, in consideration of the sum of
55 one dollar to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, assigned, transferred, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, assign, transfer, convey, and confirm unto the said parties of the second part, and to their successors duly appointed for the execution of the trusts herein set forth, and to their assigns, the following property, part of which is now constructed and part to be hereafter constructed, purchased, acquired, held, possessed and owned by the said company, in the following order, to wit:

First. And as a first mortgage upon all that portion of the railroad and railroad line of the said company from the depot in the city of Richmond, in the State of Virginia, extending down the Peninsula, between the James and York rivers, to such point or points upon those rivers or upon Chesapeake Bay as may be selected by the company, and to which the line of railroad of said company may be located and constructed, including tunnel, wharves, right of way, and warehouses, and all lands necessary for the operation of that portion of the road; also upon the branch railroad and railroad line from the main line of the said company, near the mouth of Scary creek, in West Virginia, to the mouth of the Kanawha river, with all lands and properties necessary for the operation of said branch; and also upon the bridge to be erected across the Ohio river at the city of Huntington, in the State of West Virginia, including all of that portion of the extension of said line of railroad and branch above described now completed and in process of construction, as well as that portion of the same which may hereafter be constructed or completed, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight-houses, woodhouses, sheds, watering-places, work-shops, machine-shops, buildings, bridges, tools, machinery, side-tracks, turn-outs, turn-tables, weigh-

ing scales, fixtures, locomotives, tenders, rolling-stock, fuel, equipments, and all other property which is or will be necessarily
56 or ordinarily used in operating the bridge and extension of the said railroad and the branch above described, and all rights and privileges of way and transit, and all other rights and privileges which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company, and pertaining to said bridge, extension, and branch of the said line of railroad, and all corporate rights, privileges, and franchises of said company pertaining thereto, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim, and demand, in law and in equity, of the said parties of the first part of, in, and to the same, and every part and parcel thereof.

Second. And as a second mortgage upon all that portion of the railroad and railroad line of the said company, from and including the depot at the city of Richmond, in the State of Virginia, and thence to the mouth of the Big Sandy river, on the Ohio river, in the State of West Virginia, or to such point on the Big Sandy river as shall be selected by the company, and to which the line of railroad of said company may be located and constructed, including all of the main line of railroad of said company between the depot at Richmond, Virginia, and the Big Sandy river, in West Virginia, now completed and in process of construction, as well as that portion of the same which may hereafter be constructed or completed, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering-places, work-shops, machine-shops, buildings, bridges, tools, machinery, side-tracks, turn-outs, turn-tables, weighing scales, fixtures, locomotives, tenders, rolling-stock, fuel, equipments, and all other property which is or will be necessarily or ordinarily used in operating that portion of the said railroad last mentioned, and all rights and privileges of way and transit, and all other rights and
57 privileges which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company and pertaining to that portion of the said line of railroad, and all corporate rights, privileges, and franchises of said company, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim, or demand, in law and in equity, of the said parties of the first part of, in, and to the same, and every part and parcel thereof. To have and to hold the above granted and described premises, property, and franchises, with the appurtenances, unto the said parties of the second part, and to the survivor of them, and to their successors, duly appointed, and assigns.

But it is to be understood, and it is hereby expressly agreed and

declared, that this conveyance is made and accepted for the purposes, upon the trusts, and subject to the limitations and conditions following, that is to say:

1. The said The Chesapeake and Ohio Railroad Company propose to make and negotiate a loan of fifteen millions of dollars to provide means to aid in the construction of the extension, branch, and bridge above mentioned, and in the completion of the construction and equipment of their railroad, and to that end have caused to be prepared, and intend to execute and negotiate, by sale or otherwise, fifteen thousand bonds, numbered, respectively, from number one to number fifteen thousand, inclusive, for one thousand dollars each, making in the aggregate the sum of fifteen millions of dollars.

58 The said bonds, differing only as to numbers, are in all other respects of the following form:

Mortgage Bond.

United States $1,000 gold coin. United States $1,000 gold coin.

No. ——. United States of America. No. ——.

The Chesapeake and Ohio Railroad Company, of Virginia and West Virginia, promise to pay to William H. Aspinwall, or bearer, for value received, one thousand dollars, in gold coin of the United States of America, in the city of New York, on the first day of July, in the year one thousand nine hundred and two, with interest thereon at the rate of seven per cent. per annum from the first day of October, one thousand eight hundred and seventy-two, payable semi-annually, on the first day of January and July in each year, in the city of New York, on presentation and surrender of the respective coupons hereunto annexed, both principal and interest payable in United States gold coin at par, dollar for dollar.

This bond is one of a series of fifteen thousand bonds, for one thousand dollars each, numbered, respectively, from number one to number fifteen thousand, inclusive, said bonds amounting in the aggregate to fifteen millions of dollars, all bearing even date herewith, authorized by law, and secured by a mortgage or deed of trust bearing even date with said bonds, duly executed by said company to Philo C. Calhoun and William K. Kitchen, of New York, as trustees, which is a first mortgage upon that portion of the railroad line from the depot, at Richmond, Virginia, down the Peninsula, between James and York rivers, to such points upon those rivers or upon Chesapeake Bay as may be selected by the company, including tunnel, wharves, right of way, warehouses, and all lands necessary for the operation of the road; also upon the branch from the

59 main line near the mouth of Scary creek to the mouth of the Kanawha river, and upon the bridge across the Ohio river, at the city of Huntington, with all rolling-stock, stations, fixtures, and franchises thereof and appurtenances thereto; and a second mortgage upon their railroad line from the city of Richmond, Virginia, to the mouth of the Big Sandy river, at the Ohio river, in West Virginia, with all the rolling-stock, stations, fixtures, and franchises thereof and appurtenances thereto.

In witness whereof, the Chesapeake and Ohio Railroad Company have caused their corporate seal to be hereunto affixed, and these presents to be signed by their president and treasurer, this first day of October, in the year one thousand eight hundred and seventy-two.

[SEAL.] C. P. HUNTINGTON, *President.*
JAMES J. TRACY, *Treasurer.*

Upon each bond is endorsed the following memorandum:

This bond may be registered in the owner's name on the books of the company, such registry being noted hereon by a transfer agent of the company, and thereafter no transfer shall be valid unless made by the registered owner, or his attorney, on the books of the company, and noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which it shall be transferable by delivery unless again registered in the name of the owner.

The registry of the bond as above shall not restrain the negotiability of the coupons by delivery, but the coupons may be surrendered, and the interest will then be payable only to the registered owner of the bond.

JAMES J. TRACY, *Secretary.*

On each of the bonds are endorsed the following blank memoranda of registration and transfer:

60 Registered on the books of the company (coupons —) in the name of ———,	Transferred on the books of the company (coupons —) to ———,
this —— day of ——,	this —— day of ——,
18—.	18—.
———, *Transfer Agent.*	———, *Transfer Agent.*

And also a certificate to be signed by the trustees in the following form:

We hereby certify that the within bond is one of the series of bonds secured by the mortgage described therein, and delivered to us as trustees, which has been duly recorded in the proper counties of the States of Virginia and West Virginia.

——— ———,
——— ———,
——— ———,
Trustees.

And to each of said bonds are attached sixty coupons for semi-annual interest, numbered from one to sixty, inclusive, differing in date of maturity, and containing the number of the bond to which they belong substantially in the following form (excepting the fractional coupon number one):

Coupon No. ——.

The Chesapeake and Ohio Railroad Company, of Virginia and West Virginia.

(Coupon for thirty-five dollars.)

Interest due 1st ———, ——, in U. S. gold coin, payable in the city of New York, on bond No. ——.

JAMES J. TRACY, *Treasurer.*

$35. $35.

And the fractional coupon No. 1, substantially in the following form:

61 Coupon No. 1.

The Chesapeake and Ohio Railroad Company, of Virginia and West Virginia.

(Coupon for seventeen 50-100 dollars.)

Interest due 1st Jan'y, 1873, in U. S. gold coin, payable in the city of New York, on bond No. —.

JAMES J TRACY, *Treasurer.*

$17.50. $17.50.

Now, to provide a full, fair, and available security for the principal and interest of the said fifteen-million loan, and to assure to those who may invest therein the payment of the principal money represented by the said bonds, and of the interest thereon in all respects, according to the true intent and meaning thereof, is the chief and leading purpose of this conveyance. In furtherance whereof, it is hereby agreed and declared—

II. That the said The Chesapeake and Ohio Railroad Company will set apart, in the year 1877, and in each year thereafter, from the net income of said railroad, the sum of one hundred thousand dollars, as a sinking fund, for the payment of the principal money of the said fifteen-million loan represented by the said bonds, which fund, with the interest accruing thereon, is hereby irrevocably pledged to the holders of said bonds for the final payment and redemption thereof, and shall be exclusively applied from time to time, as may be found most expedient, to the purchase, payment, and redemption of the said bonds, or such of them as can be so purchased, paid, or redeemed, until the whole loan shall be fully paid.

III. That if the said parties of the first part, or their successors, shall well and truly pay, or cause or procure to be paid, unto the holders, from time to time, of said bonds, and each and every of them, the said sum of money secured to be paid by the said bonds, and the interest thereon, at the places and times and in the manner set forth in the said bonds, according to the true intent and meaning thereof, then these presents, and all the property, estates,
62 rights, franchises, and privileges herein and hereby granted and conveyed shall cease, determine, and be void.

IV. That until default shall have been made by the parties of the first part in payment of the principal or interest of said bonds, or some of them, or until default shall have been made in respect to something herein agreed or required to be done by them, the said parties of the first part shall be permitted to possess, use, occupy, manage, and operate the said railroad property, franchises, and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take, receive, and use the tolls, rents, issues, incomes, and profits thereof, and apply the same to the payment of the current expenses of the road, and to the purchase of necessary machinery and equipment, or dispose of the same for the lawful uses of the company in any manner not inconsistent with this indenture. And the board of directors of said company may likewise distribute and pay any net annual incomes to stockholders after providing for the interest on any and all bonds which said company may owe.

V. But if default shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest, or any part thereof, and if the same shall remain unpaid for the period of six months from and after the time when the same should have been paid, according to the terms of said bonds, then the said parties of the second part, or either of them, upon the refusal of the other, or their successors in said trust, by themselves, or their agents or servants in that behalf, may, upon request of the holder or holders of not less than one million of dollars of said bonds, on which the interest or principal shall so be and have remained in default as aforesaid, enter into and upon, and take possession of all, or, in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroad, and receive the income, receipts, and profits thereof, and out of the same—

First. Pay the expenses of running and operating the same, including therein such reasonable compensations as they or
63 he may allow to the several persons employed or engaged in running and superintendence of the same, and all taxes, assessments, charges, or liens having priority or preference to the lien of these presents upon the said premises, or any part thereof, and a reasonable compensation of the parties of the second part, or their successors, or such of them as shall act in the premises, for their or his care, diligence, and responsibility in the premises, and for the services of such attorneys and counsel as may have been by him or them employed, and all the expenses of keeping the said road and appurtenances, the locomotives, and the rolling-stock thereof, in good and sufficient repair, to prevent deterioration in the values thereof, and all other reasonable and proper charges and expenses of the care and management thereof, and

Second. Pay, as far the same will suffice, all interest on the said bonds in the order in which such interest shall become due ratably; and after paying all interest which shall have become due, to apply the said moneys to the payment of the principal of such of said bonds as may be at that time unpaid, ratably and without discrimination or preference; and if, after satisfaction thereof, a surplus shall remain, to pay over such surplus to the said company,

their successors or assigns, or as any court of competent jurisdiction shall order and direct.

VI. Or in case default shall be made as aforesaid, and continue as aforesaid, it shall likewise be lawful for the said trustees, or the survivor of them, or their successors, after entry as aforesaid, or without entry, personally, or by his or their attorneys or agents, to sell and dispose of all and singular the railroad, lands, rights, property, privileges, franchises, (real and personal), and other premises hereby conveyed, or intended so to be, with the appurtenances, or so much thereof as may be necessary, at a public auction at the city of New York, to the highest bidder, at such time as the said trustees, or the survivor of them, or their successors shall designate, having first given notice of the time and place of such sale by advertise-
64 ment, published not less than once a week for eight weeks successively, in one or more newspapers published in the city of New York, in Richmond, Virginia, and in Charleston, West Virginia, and to adjourn the said sale from time to time in their or his discretion; and if so adjourned, to make the sale without further notice, at the time and place to which the same may be so adjourned, and to make, execute, and deliver to the purchaser or purchasers of the said premises good and sufficient deed or deeds in fee-simple, assignments, or other transfers in the law for the same; which sale, made as aforesaid, shall be a perpetual bar, both in law and equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the said premises, or any part or prrcel thereof, by, from, through, or under the said parties of the first part, their successors or assigns; and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorney and counsel fees, and all other expenses, advances or liabilities which may have been made or incurred by the said trustees in respect to the said lands or property, or any part or parcel thereof, or in operating or maintaining the said railroad, or any part thereof, or in managing the business thereof while in their or his possession, and in preparing for and completing the sale aforesaid, or in the performance of any of the trusts herein contained, and all payments which may have been made by him or them for taxes or assessments, and for charges or liens prior to the lien of these presents on the said premises, or any part thereof, together with a reasonable compensation for his or their own services in the execution of this trust, to be fixed by any court of competent jurisdiction, but not exceeding twenty-five thousand dollars, to apply the remaining proceeds of said sale to the payment of the interest which shall at that time have accrued on said bonds secured by these presents, or so many of them as shall have been issued by said parties of the first part, and be then outstanding, *pro rata*, until all of such interest shall be paid, and afterwards
65 to apply the remainder to the payment of the principal of said bonds, *pro rata*, until such principal shall be paid; and if, after payment of said principal and interest in full, there shall remain any surplus, to pay over such surplus to the said parties of the first part, their successors, or assigns, or to such person or per-

sons as may be ordered or directed by any court of competent jurisdiction.

And the parties of the first part do hereby declare and agree that the receipt of the trustees, or such of them as shall make the sale aforesaid, shall be a full and sufficient discharge to the purchaser or purchasers of the premises to be sold as aforesaid; and that said purchasers, having paid said purchase money, shall not be liable to see to the application thereof to or upon the trusts herein contained, or be answerable for any loss or misapplication or non-application of such purchase money, or of any part thereof, or be obliged to inquire into the necessity, propriety or authority of or for any such sale.

VII. At any sale of the aforesaid property, or any part thereof, whether made under and by virtue of the power hereby granted or by judicial authority, such sale may be either for cash or on such time or upon such terms as the trustees shall deem best for the interest of all parties, but the bonds issued by the parties of the first part and hereby secured, shall be ratably received as cash in payment from any purchaser or purchasers by the said trustees, or their successors, at the option of the holders thereof.

VIII. And the said parties of the first part hereby agree and covenant to and with the said parties of the second part, and their successors in said trust, that they will pay all ordinary and extraordinary taxes, assessments and other public burdens and charges which shall or may be imposed upon the property herein described and hereby conveyed, and every part thereof, and the said parties of the second part, the survivor of them, or their successors in said trust, or any one or more of the holders of said bonds may, in case of the default of the said parties of the first part in this behalf, pay and discharge the same, and any other lien or incumbrance
66 upon said property which may in any way, either in law or equity, be or become in effect a charge or lien thereon prior to these presents, or to which this mortgage may be subject or subordinate, and for all payments thus made, the parties so making the same shall be allowed interest thereon at the rate of seven per centum per annum, and such payments, with the interest thereon, shall be and are hereby secured to them by these presents, and the same shall be payable by the said parties of the first part to said parties of the second part in trust for the party or parties paying the same upon demand, and may be paid out of the proceeds of the sale of said property and franchises as hereinbefore provided.

IX. And the said trustees shall also, in their discretion, have full power to convey or release, upon the written request of the said The Chesapeake and Ohio Railroad Company, any lands acquired or held for the purposes of stations, shops, or other buildings; and shall also have power to convey or release as aforesaid any lands or property which shall not be necessary for use in connection with said railroad, or which may have been held for a supply of fuel, gravel or other materials, and also to convey or release as aforesaid on like request any lands not occupied by the track which may become disused by reason of a change in the location of the track, or any station house, depot or other adjacent building connected with

the said railroad, or any part thereof, and such lands not occupied by the track and adjacent to such station house, depot, shop, or other building, as the said company may deem expedient to disuse or abandon by reason of such change, and to consent to any such change, and to such other changes in the location of the track or depot or other buildings as in their judgment have become expedient, and to make and deliver the instruments or conveyances necessary or proper to carry the same into effect; but any lands which may be acquired for permanent use in substitution for those so released, shall be conveyed to the said trustees upon the trusts of these presents; and the said company shall have full power from time to time to dispose of, according to their discretion, such portions
67 of the equipment, machinery and implements at any time held or acquired for the use of the said railroad as may become unfit for use, or for any reason desirable to be changed, replacing the same by others, which shall be subject to the lien and operation of these presents.

X. It shall be the duty of the trustees to exercise the power of entry or the power of sale hereby granted, or both, or to proceed by suit or suits at law or in equity to enforce the rights of the bondholders in case of default herein specified, in the manner and subject to the qualifications herein expressed, upon the requisition of the bondholders herein required, as follows:

First. If the default be in the non-payment of interest or principal of any of the said bonds upon the written requisition of any holder or holders of not less than one million of dollars of said bonds, and a proper indemnification by such holder or holders to the trustees against the costs and expenses to be by them incurred, it shall be the duty of the trustees to enforce the rights of the bondholders under these presents by entry or sale under the power herein contained, or both, or by suit or suits at law or in equity, as they, being advised by counsel learned in the law, shall be deemed most expedient for the interest of the bondholders; or,

Second. If the default be in the omission of any act or thing required by these presents for further assuring the title of the trustees to any property or franchises now possessed or hereafter acquired, or in the omission to comply with any provision of these presents to be observed, kept, or performed by the said company, then and in either of such cases the trustees may, in their discretion, enforce, and upon the requisition as aforesaid of a majority in interest of the holders of the bonds hereby secured, it shall be their duty to enforce the rights of the bondholders by reason of such default, the said trustees being indemnified by the bondholders against costs and expenses, subject to the power hereby declared in any of the above cases of a majority in interest of the holders of the said
68 bonds, by requisition in writing, under their hands and seals, to instruct the said trustees to waive such default upon the actual payment of the interest in arrear, with the interest thereon, or other compliance with the provisions herein contained, and payment of the expenses incurred by reason of such default, or upon adequate indemnity as aforesaid, to enforce the rights of the bond-

holders by reason thereof: *Provided*, That no action of the said trustees or bondholders, or both, in waiving such default or otherwise, shall extend to or be deemed to affect any subsequent default or to impair the rights resulting therefrom.

XI. It is mutually understood and agreed by and between the parties hereto, that the word "trustees," as used in these presents, shall be construed to mean the trustees or trustee for the time being, whether original or new, and whenever a vacancy shall exist, to mean the surviving or continuing trustee, and such trustee shall, during such vacancy, be competent to exercise all the powers by those presents granted or conferred upon the parties of the second part; and it is also mutually agreed that the said trustees shall be entitled to just compensation for all services which they may hereafter render in their trust, to be paid by said company or out of the income of the property, and for that purpose may at any time apply to the courts without notice to any person except the said parties of the first part, their successors or assigns; that either of said trustees, or any successor, may resign or discharge himself of the trust hereby created by notice in writing to the said company and to the existing trustee, if there be such, three months before such resignation shall take effect, or such shorter notice as they may accept as adequate notice, and upon due execution of the conveyances hereinafter required. And in case either of said trustees, or any trustee hereafter appointed, shall die or resign, or become incapable or unfit to act in the said trust, a successor or successors to such trustee or trustees shall be appointed by the surviving or continuing trustee, with the consent of the said company, and the trustee or trustees so appointed, with the surviving or continuing trustee, shall thereupon become vested
69 with all the powers, authority, and estates granted to or conferred upon the parties of the second part by these presents, and all the rights and interests requisite to enable them or him to execute the purposes of this trust without any further assurance or conveyance so far as such effect may be lawful; but the surviving or continuing trustee shall immediately execute all such conveyances and other instruments as may be suitable or expedient for the purpose of assuring the legal estate in the premises jointly with himself to the trustee so appointed, and upon the resignation or removal by any court of competent jurisdiction of any trustee, or an appointment in his place in pursuance of these presents, all his power and authority by virtue hereof shall cease, and all the estate, right, title, and interest in the said premises of any trustee so resigning or being removed, shall, if there be a co-trustee surviving or continuing in office, wholly cease and determine, but the said trustee so resigning or being removed, shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee jointly with the continuing trustee and upon the trusts herein expressed, all the property, rights, and franchises which may be at that time held upon the said trusts: *Provided*, nevertheless, and it is hereby declared and agreed that in case it shall at any time hereafter prove impracticable after reasonable exertion to appoint in the manner hereinbefore provided a suc-

cessor to fill any vacancy which may have happened in said trust, application in behalf of the holders of the bonds secured hereby may be made by the surviving or continuing trustee, or if there be no trustee, by holders of the bonds secured hereby to the aggregate amount of one hundred thousand dollars to any court of competent jurisdiction for the appointment of a new trustee or new trustees, and the trustee or trustees when so appointed shall become vested with all the powers, authorities, and estates granted to or conferred upon the parties of the second part by these presents.

XII. And the said parties of the first part, for themselves, their successors and assigns, in consideration of the premises,
70 and of one dollar to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hereby covenant and agree to and with the said parties of the second part, and the survivor of them and their successors and assigns, that whenever and as often as the said parties of the first part, their successors or assigns, shall acquire any lands, equipment, or other property or thing of whatever name or nature for use in connection with the said railroad between the points aforesaid, or any part thereof, the said parties of the first part, their successors or assigns, shall and will acquire, possess, and hold the same and every part and parcel thereof upon and subject to the trusts of this indenture until conveyance thereof shall be duly made and delivered to the said parties of the second part, or the survivor of them, or their successors in the said trust, pursuant to the next mentioned covenant.

XIII. And the said parties of the first part, for themselves, their successors and assigns, for the consideration aforesaid, further covenant and agree to and with the said parties of the second part, and the survivor of them, their successors and assigns, that the said parties of the first part, their successors and assigns, shall and will from time to time, and at all times hereafter, and as often as thereunto requested by the trustees under this indenture, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law for the better assuring unto the said parties of the second part, the survivor of them, and their successors in said trust, upon the trusts herein expressed, the said railroad between the points aforesaid, together with all the appurtenances, franchises, and property hereinbefore mentioned, and appertaining thereto, and to which the said company are or may hereafter for any reason become entitled, or which they, their successors or assigns, may in any manner acquire for use between the points aforesaid, as by the said trustees or their counsel learned in the law shall be reasonably advised or required.

XIV. And it is also mutually understood and agreed between
71 the parties hereto, that the said parties of the second part, and the survivor of them, and their successors in said trust, shall be accountable, liable or responsible for reasonable care and diligence only in the performance of the trusts hereby created, and in the management of the said estate and property in like manner as a bailee without reward, and shall not be liable, accountable or responsible for the acts of any agent, depository or substitute em-

ployed by him or them, when such agent, depository or substitute shall have been selected with reasonable discretion, and that neither of the said trustees shall be in any manner responsible for any default or misconduct of the other.

And the said parties of the second part hereby accept the trusts created and declared by this indenture, and agree to discharge the same pursuant to the provisions in that behalf herein contained.

In witness whereof, the said The Chesapeake and Ohio Railroad Company have caused their corporate seal to be hereunto affixed, and these presents to be signed by their president and treasurer, and the said parties of the second part have hereunto set their hands and seals, the day and year first above written.

[SEAL.] THE CHESAPEAKE AND OHIO RAILROAD COMPANY,
By C. P. HUNTINGTON, *President*,
JAMES J. TRACY, *Treasurer*.
P. C. CALHOUN. [L. S.]
WM. K. KITCHEN. [L. S.]

Signed, sealed and delivered in the presence of—
JAMES B. HAWES.
CHARLES NETTLETON.

72 STATE OF NEW YORK, } *ss.:*
City and County of New York, }

I, Charles Nettleton, a commissioner appointed by the Governor of the State of Virginia for the State of New York, do hereby certify that C. P. Huntington, the president of the Chesapeake and Ohio Railroad Company, and James J. Tracy, the treasurer of the same company, whose names are signed to the foregoing writing or instrument, bearing date on the 1st day of October, A. D. 1872, as such president and treasurer, this day appeared before me in person, in my State aforesaid, and being by me duly sworn, did each depose and say that he, said C. P. Huntington, was the president of the Chesapeake and Ohio Railroad Company, and that he, said James J. Tracy, was the treasurer of the same company; that he, said C. P. Huntington, resided in the city of New York, in the county of New York, and State of New York; that he, said James J. Tracy, resided in the town of Greenburg, county of Westchester, and State of New York; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of directors of said company, and that they severally signed their names thereto by the like order as president and treasurer of said company, respectively; and they, the said C. P. Huntington and James J. Tracy, also severally acknowledged to me that they executed the same as the act and deed of the said The Chesapeake and Ohio Railroad Company. And I do further certify that Philo C. Calhoun and William K. Kitchen, whose names are signed to the writing or instrument above, bearing date on the 1st day of October, 1872, have severally acknowledged the same before me in my State aforesaid.

Given under my hand and official seal, at said city of New York, this 13th day of March, A. D. 1873.

[SEAL.] CHARLES NETTLETON,
Commissioner for Virginia in New York.

73 STATE OF NEW YORK, } ss:
City and County of New York, }

I, Charles Nettleton, a commissioner appointed by the Governor of the State of West Virginia for the State of New York, do certify that C. P. Huntington, the president of the Chesapeake and Ohio Railroad Company, and James J. Tracy, the treasurer of the same company, whose names are signed to the foregoing writing or instrument, bearing date on the first day of October, A. D. 1872, as such president and treasurer, this day appeared before me in person, in my State aforesaid, and being by me duly sworn, did each depose and say that he, said C. P. Huntington, was the president of the Chesapeake and Ohio Railroad Company, and that he, said James J. Tracy, was the treasurer of the same company; that he, said C. P. Huntington, resided in the city of New York, in the county of New York, and State of New York; that he, said James J. Tracy, resided in the town of Greenburg, county of Westchester, and State of New York; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of directors of said company, and that they severally signed their names thereto by the like order as president and treasurer of said company, respectively; and they, the said C. P. Huntington and James J. Tracy, also severally acknowledged to me that they executed the same as the act and deed of the said The Chesapeake and Ohio Railroad Company. And I do further certify that Philo C. Calhoun and William K. Kitchen, whose names are signed to the writing or instrument above, bearing date on the first day of October, 1872, have severally acknowledged the same before me in my State aforesaid.

Given under my hand and official seal, at said city of New York, this 13th day of March, A. D. 1873.

[SEAL.] CHARLES NETTLETON,
Commissioner for West Virginia in New York.

74 STATE OF WEST VIRGINIA:

KANAWHA COUNTY COURT CLERK'S OFFICE,
March 20, 1873.

This deed of trust or mortgage from the Chesapeake and Ohio Railroad Company to Philo C. Calhoun and William K. Kitchen was this day presented to me in my office, and thereupon, together with the certificates of acknowledgment thereto annexed, is admitted to record.

Teste: JOEL S. QUARRIER,
Clerk Kanawha County Court.

A copy. Teste: HAMILTON MORRIS,
Clerk Kanawha C'ty Court.

CHES. & OHIO RAILWAY CO. *vs.* JOSEPH S. MILLER, Auditor, &c.

Exhibit "D."

A copy. Teste: SAM'L B. McCOLLOCH, *Clerk.*

EXHIBIT D.

STATE OF VIRGINIA:

In the Circuit Court of the City of Richmond, March 26th, 1877.

WILLIAM BUTLER DUNCAN and PHILO C. CALHOUN, as Trustees, Complainants,
against
THE CHESAPEAKE AND OHIO RAILROAD COMPANY and others, Defendants.

Decree.

Richmond: F. A. Christian, book and job printer. 1877.

75 STATE OF VIRGINIA:

In the Circuit Court of the City of Richmond, March 26th, 1877.

WILLIAM BUTLER DUNCAN and PHILO C. CALHOUN, as Trustees, Complainants,
against
THE CHESAPEAKE & OHIO RAILROAD COMPANY, The Board of Public Works of the State of Virginia, John B. Young and Robert R. Howison, trustees; William Butler Duncan, Philo C. Calhoun and William Orton, surviving trustees; James Lyons, sole surviving trustee, and Philo C. Calhoun, trustee; John Castree, substituted trustee, and others, Defendants.

This cause coming on to be heard upon the record, exhibits, and papers therein, heretofore filed, noticed and read, and upon the report of the master commissioner, hereinbefore duly appointed, filed on the 6th day of January, 1877, and the supplemental report of said commissioner this day filed, and upon the petition of James Lyons, and the exhibits therewith this day filed, and to which reports no exception has been taken, and upon the motion of the Commonwealth of Virginia that no decree of sale be made in this cause until the amount claimed for taxes against the defendant company, as appears by special report in the cause, be established and ascertained, and when so established and ascertained, that provision be made for the satisfaction thereof in said decree, in support of which motion were exhibited as part of the record a petition of the said Commonwealth to the Supreme Court of the United States in the Chesapeake and Ohio Railroad Company, plaintiff in error, against the State of Virginia, defendant in error (four cases,) and answer of said defendant to said petition, and the order of said supreme court thereon that "the said cases may be set down for argument on any day that may suit the convenience of counsel, or if they can not agree, we will make such further order in that behalf as may appear

necessary," and upon the like motion that provision be made in any decree which may be made for satisfaction of the dividend bond due from the Chesapeake and Ohio Railroad Company to the
76 Commonwealth, which is mentioned in the answer of the Board of Public Works, and also for a reservation of one-half of one per cent. on the gross amount of sales for the use of the Commonwealth. The respective parties having appeared and having been duly heard by counsel, and the premises having been fully considered and due deliberation had, it is ordered, adjudged, and decreed—

I. That the said motions of the Commonwealth be, and the same are hereby, overruled, and that all questions touching the indebtedness claimed to exist in favor of the Commonwealth, in respect of said dividend bond, be heard and determined by this court before the sale hereinafter provided for. If such indebtedness shall be found to exist to the extent that it shall be established, it will constitute a lien on the mortgaged premises, upon the same footing as the other indebtedness of the said Virginia Central Railroad Company, in the eighth paragraph of this decree hereinafter mentioned, and must be provided for accordingly. It is further ordered and decreed that the said report of the said master commissioner be, and the same hereby is, in all things confirmed, and the facts therein stated are found and adjudged to be true.

II. That all and singular the facts stated in the bill of complaint as to the creation and organization of the defendant, The Chesapeake and Ohio Railroad Company, and as to the franchises and property acquired and possessed by the said defendant company, are true.

III. That the mortgaged premises, whereof the said bill of complaint contains a general description, consist, in addition to the franchises, rights, and privileges appertaining to the said defendant company, of all and singular the premises and property specified in the receiver's inventory heretofore filed in this cause, with such changes and modifications therein and thereof as are stated and specified in the deposition of the receiver referred to in the master's report and made part thereof, together with all property of every kind embraced in the said master's report of assets.

77 IV. That all the indebtedness, to secure which the Virginia Central Railroad Company executed and delivered a deed of trust to James Lyons, H. W. Fry and William H. MacFarland, as trustees, bearing date the tenth day of December, one thousand eight hundred and fifty-one, was, before the filing of the bill of complaint in this action, fully paid and satisfied; and that the estate conveyed by the said deed to the said trustees should be conveyed and released to the said Chesapeake and Ohio Railroad Company as the successor to all the right, title and interest of the said Virginia Central Railroad Company in and to the premises, such release and conveyance to inure to the benefit and advantage of the several incumbrances hereinafter mentioned in the due order of their respective priorities; and the said James Lyons, the surviving trustee under the said deed, is hereby directed to make such release and con-

veyance with all convenient speed, and report his action in the premises to this court.

V. That the mortgage executed and delivered by the Virginia Central Railroad Company to the Board of Public Works of the State of Virginia, dated April first, one thousand eight hundred and fifty, is a subsisting and first lien, for the purpose therein specified, on all and singular the premises embraced in the description thereof contained in the said mortgage—that is to say, the railroad of the said Virginia Central Railroad Company, possessed by the said company at the date of the said mortgage, together with the lands heretofore acquired by the said company for the said road; that the principal of the bonds of the said company to the amount of one hundred thousand dollars in the aggregate was guaranteed by the State as contemplated and provided for in the said mortgage; that the whole amount of the bonds so issued by the said company and guaranteed by the State are outstanding and unpaid; that seventy thousand dollars in amount thereof are payable on the first day of April, one thousand eight hundred and eighty, and thirty thousand dollars in amount thereof are payable on the first day of July, one thousand eight hundred and eighty.

78 That the whole amount of interest which had accrued and become due and payable on the said bonds so issued and guaranteed, on and prior to the first day of January, 1877, and which still remains due and unpaid, was and is the sum of sixteen thousand six hundred and forty-one dollars.

And whereas it appears to this court that the premises hereinafter directed to be sold, will sell to better advantage if the same are sold free from the incumbrance of the lien created by the said mortgage, and that the premises can be so sold without prejudice to the said Board of Public Works of the State of Virginia, it is therefore ordered, adjudged and decreed that when the premises hereinafter directed to be sold shall be sold in pursuance of this decree, the same and every part thereof shall be sold free and discharged of and from the said lien; but as one of the conditions of the said sale and of the confirmation thereof, the purchaser or purchasers, his or their representatives or assigns, shall be required to, and shall in fact and simultaneously with the conveyance of the premises to the said purchaser or purchasers, his or their representatives or assigns, execute and deliver a deed of trust for the security of said indebtedness, as hereinafter particularly directed, to be approved by this court, of the same premises now embraced in the said mortgage, which mortgage or deed of trust shall, in like manner as the said existing mortgage, constitute a first lien upon the said premises.

VI. That the trust deed executed and delivered by the said Virginia Central Railroad Company to H. W. Fry, W. H. MacFarland and James Lyons, trustees, dated June 2d, 1854, constitutes a lien upon the railroad and other premises specified therein, which said lien is next in order of priority to the lien in the last preceding paragraph mentioned. That of the bonds of the said Virginia Central Railroad Company, issued under and in pursuance of the said deed of trust, and intended to be secured thereby, there are now outstand-

ing and unpaid bonds to the amount of nine hundred and eighteen thousand dollars ($918,000), the principal of which bonds will become due and payable on the first day of July, one thousand eight
79 hundred and eighty-four. That the whole amount of interest which had accrued and become due and payable on the said bonds on and prior to the first day of January, one thousand eight hundred and seventy-seven, and which still remains due and unpaid, was and is the sum of one hundred and fifty-eight thousand eight hundred and twenty dollars, represented by interest coupons, and the further sum of fifteen thousand nine hundred and fifty-nine dollars and ninety cents of interest which has accrued upon said coupons, and the further sum of three thousand three hundred and sixty dollars interest which has accrued upon registered bonds, amounting in the aggregate to the sum of one hundred and seventy-eight thousand one hundred and thirty-nine dollars and ninety cents.

VII. That the trust deed of the said Virginia Central Railroad Company executed and delivered to John B. Young and Robert R. Howison, trustees, dated the sixth day of February, one thousand eight hundred and sixty-six, constitutes a lien upon the railroad and other premises specified therein, which said lien is next in order of priority to the lien in the last preceding paragraph mentioned; that of the bonds issued by the said company, under and in pursuance of the said deed of trust, and intended to be secured thereby, there are now outstanding and unpaid bonds to the amount of three hundred thousand dollars ($300,000); that the said bonds became due and payable on the first day of January, one thousand eight hundred and seventy-six; the amount of interest that had accrued and become due and payable on the said bonds on and prior to the first day of January, one thousand eight hundred and seventy-seven, and which still remains due and unpaid, was and is the sum of forty-five thousand four hundred and forty dollars, represented by interest coupons, and the further sum of four thousand eight hundred and fifty-two dollars and eighty cents interest, which, at the date last aforesaid, had accrued upon the said coupons, and the further sum of eighteen thousand dollars, interest on said three hun-
80 dred thousand dollars, accrued since January 1st, 1876, the date of its maturity, up to January 1st, 1877, amounting in the aggregate to sixty-eight thousand two hundred and ninety-two dollars and eighty cents.

VIII. That in and by the contract of the 31st August, 1868, authorized by statute and made part of the charter of the Chesapeake and Ohio Railroad Company, it was, and is, among other things, provided as follows: "Nothing contained in any contract made by this company shall have the effect to deprive the present creditors of the company of their claims for satisfaction out of the present property of the company; and it shall be the duty of the president and directors, before executing any further lien on the present property of the company, to secure by mortgage any portion of the funded or floating debt not heretofore so secured that cannot be

promptly paid off in the ordinary administration of the affair of the company."

In pursuance of this requirement, it was and is provided, in the trust deed executed and delivered to Philo C. Calhoun, William Butler Duncan, William Orton, and Matthew F. Maury, dated the first day of October, one thousand eight hundred and sixty-eight, that the payment and performance of all and singular the obligations and liabilities of the said Virginia Central Railroad Company, above referred to, should be secured by the said deed of trust; that of the obligations and liabilities so secured to be paid and performed there are now outstanding and unpaid the following, that is to say:

First. Certain bonds issued by the Virginia Central Railroad Company and dated October 1st, 1851, and payable October 1st, 1866, to the amount in aggregate of three thousand and two dollars and ninety cents, with interest accrued thereon prior to the first day of January, 1877, and then due to the amount of three thousand and sixteen dollars and sixty-four cents.

Second. Certain other bonds issued by the said Virginia Central Railroad Company, dated October fifteenth, 1853, and payable
81 October fifteenth, 1875, amounting in the aggregate to twenty-one thousand seven hundred and sixty dollars, with interest accrued thereon prior to the first day of January, 1877, and due on that day to the amount of eight thousand seven hundred and eighteen dollars and seventy cents.

Third. Certain other bonds issued by the Virginia Central Railroad Company, dated July 1st, 1855, payable July first, 1865, amounting in the aggregate to seventeen hundred and seventy-six dollars, with interest accrued thereon prior to the first day of January, 1877, and due on that day to the amount of seventeen hundred and five dollars and thirty-four cents.

Fourth. Certain other bonds issued by the said Virginia Central Railroad Company in the months of July, August, September, and October, respectively, 1861, payable in one and two years, respectively, after date of issue, amounting in the aggregate to five hundred and forty dollars, with interest accrued thereon prior to January first, 1877, and due at that date to the amount of four hundred and ninety-four dollars and ten cents.

Fifth. Certain other bonds issued by the said Virginia Central Railroad Company, payable January first, 1877, with interest at the rate of eight per cent. per annum, payable semi-annually, on the first day of January and July in each year, amounting in the aggregate to one hundred and sixty thousand five hundred dollars, with interest thereon accrued prior to the first day of January, 1877, and due on that day to the amount of forty-four thousand four hundred and eight dollars, represented by interest coupons, and the further sum of four thousand and nine dollars and thirty-two cents for interest, which had accrued upon said coupons on the first day of January, 1877, amounting in the aggregate to forty-eight thousand four hundred and seventeen dollars and thirty-two cents.

That the above and foregoing obligations of the Virginia Central Railroad Company, in this paragraph mentioned, constitute a lien

upon all and singular the premises described in said trust deed in this paragraph before mentioned, next in order of priority to the lien in the preceding seventh paragraph mentioned.

82 It further appears that Henry M. Matthews and Robert Stiles, assignee of A. T. Caperton, deceased, and the State of Virginia, respectively, claim to be creditors of the said Virginia Central Railroad Company, and that their respective debts are secured by the charter of the said defendant company and the trust deed next hereinafter mentioned. If such claims shall be sustained to the extent that they are so established, they will constitute liens upon the same footing as the other indebtedness of the said Virginia Central Railroad Company in this paragraph before mentioned, and must be provided for accordingly. All questions touching these claims so made as aforesaid will be determined before the sale hereinafter provided for.

That the said Chesapeake and Ohio Railway Company conveyed to the said Calhoun, Duncan, Orton and Maury, in trust for the purposes therein mentioned, "all and singular the estate and property, real, personal, and mixed, and all fixtures, rights, privileges, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants and contracts of all and every kind held and owned or occupied by the said company, that is to say, all and singular the railroads or railways of said company from and including the terminus and depot at Richmond, in the county of Henrico, in the State of Virginia, and thence to the mouth of the Big Sandy river, on the Ohio river, including a proposed branch line from Charleston to Point Pleasant, in the State of West Virginia, together with all and singular the lands, tracks, lines, rails, bridges, ways, rights of ways and materials, buildings, piers, wharves, erections, fences, walls, fixtures, privileges, franchises, rights and interests, real estate, personal property, choses in action, lease-hold and other things of and belonging to said company of every kind, nature and character in either of the said States of Virginia or West Virginia, and all the tolls, income, issues and profits to be had or derived from the same, or any part or portion thereof, or from any part or portion of said term or terms or either thereof, and all the right to receive or recover the same, and all railway stations and depots,

83 with all the appurtenances necessary or convenient for the sole, complete, and entire use and operation, as well as maintenance, of the said roads or railways owned or leased by the said company, and also all the locomotives, engines, tenders, cars, carriages, tools, and machinery belonging or appertaining to said railroads and railways so owned as aforesaid, and all improvements or additions made or to be made to any or all of said properties, estates, railroads or railways, and their appurtenances by said party of the first part or by others; also all and every other estate, interest, property, or thing which the said party of the first part own and hold, or may and shall hereafter acquire and hold, necessary or convenient for the use, occupation, operation, and enjoyment of all or any of its said railroads, railways, leases, and property, rights, privileges, and franchises, or any part or portion thereof, and also all the

rights and privileges to use the said road-beds, tracks, sidings, turnouts and switches constructed at the execution of these presents, or which may and shall be hereafter constructed for the convenient use of said railroads or railways, or any of them owned or operated by said first party, as fully and as effectually as the said company, party of the first part, is or may be by law entitled to have or acquire."

That said Chesapeake and Ohio Railway Company issued under and in pursuance of the said deed of trust certain of its own bonds, all of which were afterwards retired.

Bonds under this deed of trust to the amount of seven thousand dollars, not negotiated or sold, were delivered to Dean, McGinnis & Co., agents for the Chesapeake and Ohio Railroad Company, for sale, as the said company claims. These bonds were dated October first, 1868, and were payable October first, 1898, with interest in the meantime at the rate of seven per cent. per annum, payable semi-annually on the first day of April and the first day of October in each year, principal and interest payable in United States gold coin.

The said bonds, to the amount of seven thousand dollars, are still outstanding in the hands of the said agents, who still hold
84 possession thereof under some claim of right or title therein or thereto, which claim is denied by the said company. Unless the validity of this claim shall have been determined by this court, and the lien of these bonds, if any, discharged or provided for prior to the sale herein directed, the purchaser will be required to deposit in this court the amount of the principal and accrued interest of said bonds to await such determination.

IX. That on the fifteenth day of January, 1870, the defendant, the said Chesapeake and Ohio Railroad Company, executed and delivered a deed of trust to William Butler Duncan and Philo C. Calhoun, trustees, wherein and whereby the said company conveyed to the said trustees the premises in the said deed, described as follows, that is to say: "The following property, part of which is now constructed and part to be hereafter constructed, purchased, acquired, held, possessed, and owned by the said company, to wit, all that portion of the railroad and the railroad line of the said company from and including the terminus and depot at Richmond, in the State of Virginia, and thence to the mouth of the Big Sandy river, on the Ohio river, in the State of West Virginia, including all of said line of railroad now completed and in process of construction, as well as that portion of the same which may hereafter be constructed or completed, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, work shops, machine shops, buildings, bridges, tools, machinery, side tracks, turnouts, turn-tables, weighing scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all other property which is necessary or ordinarily used in operating the said railroad, and all rights and privileges of way and transit, and all other rights and privileges which are now or may be hereafter constructed, purchased, acquired, held, possessed, or

owned by the said company and pertaining to the said line of railroad, and all corporate rights, privileges, and franchises of said company, together with all and singular the tenements,
85 hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim, and demand in law and in equity of the said parties of the first part of, in, and to the same and every part and parcel thereof."

That under and in pursuance of the said trust deed the said company issued its bonds to the amount in the aggregate of fourteen million nine hundred and ninety-two thousand dollars, all of which are dated the fifteenth day of January, 1870, payable in the gold coin of the United States on the first day of November, 1899, with interest in the meantime at the rate of six per cent. per annum, payable semi-annually on the first day of May and the first day of November in each year, in like gold coin. The bonds so issued are now outstanding and unpaid. The amount of interest accrued thereon prior to the first day of January, 1877, and which still remains unpaid, is the sum of three millions one hundred and sixty thousand and thirty-eight dollars, represented by interest coupons; and the further sum of three hundred and nine thousand two hundred and ninety-four dollars and ninety-seven cents interest which had then accrued on said coupons; and the further sum of one hundred and ninety-six thousand four hundred and twenty dollars for interest which had then accrued on registered bonds, amounting in the aggregate to three million six hundred and sixty-five thousand seven hundred and fifty-two dollars and ninety-seven cents, payable in gold coin as aforesaid.

That this trust deed and the indebtedness secured thereby constitute a lien upon all and singular the premises described in the said deed next in priority after the lien specified in the last preceding paragraph.

X. That on the first day of October, 1872, the said Chesapeake and Ohio Railroad Company executed and delivered to the said Philo C. Calhoun and to William K. Kitchen, as trustees, a
86 deed of trust, wherein and whereby the said company did convey, for the purpose therein mentioned, to the said trustees all the right, title, and interest of the said company in and to the premises and property therein described as follows, that is to say: "All that portion of the railroad and railroad line of the said company from the depot, in the city of Richmond, in the State of Virginia, extending down the peninsula between the James and York rivers, to such point or points upon those rivers or upon the Chesapeake Bay as may be selected by the company, and to which the line of railroad of said company may be located and constructed, including tunnel, wharves, right of way, and warehouses, and all lands necessary for the operation of that portion of the road; also upon the branch railroad and railroad line from the main line of the said company, near the mouth of Scary creek, in West Virginia, to the mouth of the Kanawha river, with all lands and properties neces-

sary for the operation of said branch; and also upon the bridge to be erected across the Ohio river at the city of Huntington, in the State of West Virginia, including all of that portion of the extension of said line of railroad and branch above described now completed and in process of construction, as well as that portion of the same which may hereafter be constructed or completed, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering-places, workshops, machine shops, buildings, bridges, tools, machinery, side tracks, turn-outs, turn-tables, weighing-scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all other property which is or will be necessarily or ordinarily used in operating the bridge and extension of the said railroad and the branch above described, and all rights and privileges of way and transit and all other rights and privileges which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company, and pertaining to said bridge, extension, and branch of the said line of railroad, and all corporate rights, privileges and franchises of said company pertaining thereto, together with all
87 and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim, and demand in law and in equity of the said parties of the first part of, in, and to the same, and every part and parcel thereof. All that portion of the railroad and railroad line of the said company, from and including the depot at the city of Richmond, in the State [of] Virginia, and thence to the mouth of the Big Sandy river, on the Ohio river, in the State of West Virginia, or to such point on the Big Sandy river as shall be selected by the company, and to which the line of railroads of said company may be located and constucted, including all of the main line of railroad of said company between the depot at Richmond, Virginia, and the Big Sandy river, in West Virginia, now completed and in process of construction, as well as that portion of the same which may hereafter be constructed or completed, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering-places, work-shops, machine-shops, buildings, bridges, tools, machinery, side-tracks, turn-outs, turn-tables, weighing-scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all other property which is or will be necessarily or ordinarily used in operating that portion of the said railroad last mentioned, and all rights and privileges of way and transit, and all other rights and privileges which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company, and pertaining to that portion of the said line of railroad, and all corporate rights, privileges, and franchises of the said company, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remain-

ders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim, and
88 demand in law and in equity of the said parties of the first part of, in, and to the same, and every part and parcel thereof."

That under and in pursuance of the said deed of trust the said company issued its bonds to the amount of twelve million one hundred and seventy-four thousand dollars, dated the first day of October, 1872, and payable in gold coin of the United States on the first day of July, 1902, with interest thereon, in the meantime, at the rate of seven per cent. per annum, payable in like gold coin; that all the bonds so issued are outstanding and unpaid.

That prior to the first day of January, one thousand eight hundred and seventy-seven, there had accrued and was then due, and still remains unpaid, interest on the said bonds to the amount of three million one hundred and fourteen thousand seven hundred and ninety dollars, represented by interest coupons, and the further sum of two hundred and ninety-seven thousand four hundred and fifty-four dollars and fifty cents interest which had then accrued on said coupons; and the further sum of ten thousand five hundred and thirty-five dollars for interest which had then accrued on registered bonds, amounting in the aggregate to three million four hundred and twenty-two thousand seven hundred and seventy-nine dollars and fifty cents, payable in gold coin as aforesaid.

That the said trust deed, and the said indebtedness secured thereby, constitute a first lien upon all and singular that part of the railroad of the said Chesapeake and Ohio Railroad Company extending from the depot in the city of Richmond to the point on the James river now constituting the terminus of the said road on that river, together with all rights of way and franchises for the extension of the said line of road down the peninsula between the James and York rivers, to such point or points on said rivers or on the Chesapeake Bay as may hereafter be selected, and to which the line of said railroad may hereafter be constructed, including the tunnel and all wharves, rights of way, warehouses and lands of the said company appurtenant to that part of the road of the said company extending from the said depot in Richmond
89 to the terminus on the James river as aforesaid, and all other property and franchises of every kind and description appurtenant to this part of the line of the railroad of the said company, and to the franchises for the extension thereof, and all other parts of the entire line of the road of the said company, and all rights, franchises, and privileges to said company belonging, not embraced in the trust deed in the preceding ninth paragraph mentioned. And the said trust deed, and the indebtedness secured thereby, constitute a lien on all and singular the other property of every kind and description embraced and described in the said deed of trust next in order of priority to the lien in the next preceding (ninth) paragraph mentioned.

XI. That the following judgments constitute liens upon the real estate of the said defendant, The Chesapeake and Ohio Railroad

Company, in the order in which the same are hereinafter stated, subject, however, to the several liens hereinbefore specified; that is to say:

First. A judgment recovered by the National Valley Bank of Staunton, at the March term, 1874, of the circuit court of the county of Augusta, in the State of Virginia, for the sum of sixty-three dollars and nineteen cents, with interest thereon from first May, 1872, until paid, and seven dollars and six cents costs.

Second. A judgment recovered by A. W. Handley, on the ninth June, 1874, in the circuit court of Cabell county, in the State of West Virginia, for the sum of one thousand dollars, with interest from said ninth of June, 1874, and thirty-two dollars and fifty-two cents costs.

Third. A judgment recovered by E. N. Kinchelor, on the — June, 1874, in the circuit court of Augusta county, in the State of Virginia, for the sum of fifty-six dollars and twenty-five cents, with interest from first June, 1875, and eighty-three cents costs.

Fourth. A judgment recovered by H. M. Schmuck, on the seventh October, 1874, in the circuit court of the United
90 States for the eastern district of Virginia, for the sum of three thousand and twenty-three dollars and eighty-three cents, with interest on twenty-eight hundred and ninety-seven dollars and sixteen cents from eleventh May, 1874, and thirty-four dollars and twenty cents costs.

Fifth. A judgment recovered by T. F. Watkins, on the fifth September, 1874, in the circuit court of Fayette county, in the State of West Virginia, for the sum of two thousand and thirty dollars and fifty-five cents, with interest from said fifth September, 1874, and twenty-one [dollars] and seventy cents costs.

Sixth. A judgment recovered by Clark & MacDonald, on the — October, 1874, in the circuit court of Augusta county, Virginia, for the sum of seventeen hundred and forty dollars and thirty-four cents, with interest from tenth November, 1873, and eleven dollars and ninety-eight cents costs.

Seventh. A judgment recovered by W. L. Fleming, on the twentieth of November, 1874, in the circuit court of the city of Richmond, Virginia, for the sum of twenty-two hundred and fifty-seven dollars and thirty-one cents, with interest on thirteen hundred and eighty-one dollars and ten cents, part thereof, from tenth October, 1873, and on four hundred and forty-seven dollars and seventy-eight cents, another part thereof, from ninth October, 1873, and on four hundred and twenty-eight dollars and forty-three cents, residue thereof, from third November, 1873, and ten dollars and seventeen cents costs. And also—

A judgment recovered by Samuel McCubbin, on said twentieth November, 1874, in said circuit court of the city of Richmond, Virginia, for the sum of seven hundred and six dollars and fifty-nine cents, with interest from tenth September, 1873, and eight dollars and sixty-seven cents costs. And also—

A judgment recovered by M. J. Wadsworth, on the eleventh December, 1874, in said circuit court of the city of Richmond, Virginia,

for the sum of twelve thousand and four dollars and twenty
91 cents, with interest from fourteenth February, 1873, and twenty-three dollars and eighty-four cents costs.

Eighth. A judgment recovered by Robert T. Patton, on —— November, 1874, in the circuit court of Kanawha county, West Virginia, for the sum of twenty-five cents, and forty-six dollars and forty-nine cents costs. And also—

A judgment recovered by Patrick McAvery, on —— October, 1874, in the county court of the county of Kanawha, West Virginia, for the sum of twenty dollars and sixty-eight cents, with interest from twenty-third October, 1874, and fourteen dollars and forty-five cents costs.

Ninth. A judgment recovered by Carter Cook, assignee of Hall & Cook, on first February, 1875, in the county court of Cabell county, West Virginia, for the sum of thirteen hundred and sixty-five dollars and twenty-two cents, with interest from said first February, 1875, and twenty dollars and five cents costs.

Tenth. A judgment recovered by the Baltimore Bridge Company, on seventeenth February, 1875, in the circuit court of the city of Richmond, Virginia, for the sum of ten thousand dollars, with interest from twenty-second September, 1873, and seventeen dollars and thirty-six cents costs. And also—

A judgment recovered by the State Bank of Virginia, on said seventeenth February, 1875, in said circuit court of Richmond, Virginia, for the sum of five thousand and twenty-nine dollars and forty-nine cents, with interest from sixth October, 1873, on twenty-seven hundred and eighty-four dollars and forty cents, part thereof, and from fifth November, 1873, on twenty-two hundred and forty-five dollars and nine cents, residue thereof, and ten dollars and fifty-seven cents costs. And also—

Another judgment recovered by said State Bank of Virginia, on said seventeenth February, 1875, in said circuit court of the city of Richmond, Virginia, for the sum of seven hundred and sixty-three dollars and seventy cents, with interest from fourteenth October, 1873, and eight dollars and forty-two cents costs.

92 Eleventh. A judgment recovered by W. E. Wood & Company, on —— March, 1875, in the circuit court of Augusta county, Virginia, for the sum of seven hundred and seventy-two dollars and thirty-nine cents, with interest from sixth November, 1873, and nine dollars and seventy-eight cents costs.

Twelfth. A judgment recovered by William Tyree, on —— March, 1875, in the circuit court of Fayette county, West Virginia, for the sum of three hundred and fifty-eight dollars and seventy-six cents, with interest and costs amounting to the sum of twenty-six dollars and ninety-nine cents.

Thirteenth. A judgment recovered by J. L. Myers, on twenty-sixth April, 1875, in circuit court of Alleghany county, Virginia, for the sum of twenty-four dollars, with interest from first November, 1873, and seven dollars and sixty cents costs. And also—

A judgment recovered by E. Smith for D. Y. Huddleston & Company, on said twenty-sixth April, 1875, in said circuit court of Alle-

ghany county, Virginia, for the sum of thirty-nine dollars, with interest from first September, 1873, and seven dollars and fifty-five cents costs. And also—

A judgment recovered by Moses Johnson and wife, on said twenty-sixth April, 1875, in said circuit court of Alleghany county, Virginia, for the sum of seventy-five dollars, with interest from twenty-sixth April, 1875, and seven dollars and seventy-five cents costs.

Fourteenth. A judgment recovered by the Kanawha Valley Bank, on the twenty-fourth May, 1875, in the circuit court of the city of Richmond, Virginia, for the sum of six hundred and twenty-nine dollars and fifty cents, with interest from twelfth February, 1875, and nine dollars and six cents costs. And also—

A judgment recovered by Morris Phillips and Company, on said twenty-fourth May, 1875, in said circuit court of the city of Richmond, Virginia, for the sum of eleven hundred and eighty-eight dollars and fifty-eight cents, with interest on six hundred and thirty-one dollars and eighty-three cents, part thereof, from seventeenth February, 1875, and on five hundred and fifty-six dollars and seventy-five cents, residue thereof, from twentieth February, 1875, and nine dollars and fifty-six cents costs. And also—

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A judgment recovered by Joseph P. Winston, on twenty-fourth June, 1875, in said circuit court of the city of Richmond, Virginia, for the sum of thirty-one hundred and seventy-three dollars and forty-six cents, with interest from eighteenth November, 1873, and eleven dollars and forty-nine cents costs. And also—

A judgment recovered by Joseph H. Crenshaw, on the nineteenth July, 1875, in said circuit court of the city of Richmond, Virginia, for the sum of sixty-five hundred and forty dollars, with interest on twenty-two hundred and twenty-five dollars, part thereof, from fourth August, 1874, and on twenty-one hundred and eighty dollars, another part thereof, from fourth November, 1874, and on twenty-one hundred and thirty-five dollars, residue thereof, from fourth February, 1875, subject to a credit of sixteen hundred and twenty-seven dollars and eighty-seven cents, as of twenty-seventh March, 1875, and eleven dollars and ninety-six cents costs.

Fifteenth. A judgment recovered by A. W. Handley, on —— June, 1875, in the county court of Putnam county, West Virginia, for the sum of one hundred and twenty-nine dollars and twenty-one cents, with interest from eighteenth September, 1873, and —— costs.

Sixteenth. A judgment recovered by A. S. Lee, for the benefit of Gertrude Mahood, on —— April, 1875, in the county court of Kanawha county, West Virginia, for the sum of six hundred and twelve dollars and nineteen cents, with interest from third May, 1875, and twenty dollars and eighty-five cents costs.

Seventeenth. A judgment recovered by Bibb & Tabler, on the first July, 1875, in the circuit court of Cabell county, West Virginia, for the sum of nine hundred and sixty-six dollars and two cents, with interest from said first July, 1875, and thirty-five dollars and ninety-nine cents costs. And also—

A judgment recovered by Thomas Medford, on the second July, 1875, in said circuit court of Cabell county, West Virginia, for the sum of two hundred and sixty-three dollars and fifty cents, with interest from said second July, 1875, and fourteen dollars and fifty cents costs. And also—

A judgment recovered by John G. Uncel, on said second July, 1875, in said circuit court of Cabell county, West Virginia, for the sum of six hundred and fifty dollars, with interest from said second July, 1875, and twenty-eight dollars and twenty-five cents costs.

Eighteenth. A judgment recovered by the Citizens' Bank of Norfolk, on the third November, 1875, in the circuit court of the city of Richmond, Virginia, for the sum of ten thousand and two dollars, with interest from twenty-first November, 1873, and sixteen dollars and eighty-six cents costs.

Nineteenth. A judgment recovered by Eli Ballinger, on the eighteenth November, 1875, in the county court of Summers county, West Virginia, for the sum of forty dollars, with interest, and thirty-two dollars and eighty cents costs. Also—

A judgment recovered by John A. Richmond, on nineteenth November, 1875, in said court for the sum of thirty-five dollars, with interest, and seventy-seven dollars and thirty-five cents costs. Also—

A judgment recovered by George Fox, on said nineteenth November, 1875, in said court, for twenty-five dollars, with interest, and thirty-six dollars and sixty cents costs. Also—

A judgment recovered by R. F. Davis, on said nineteenth November, 1875, in said court, for the sum of sixteen dollars and sixty cents, with interest from second May, 1874, and ten dollars and sixty cents costs. And also—

A judgment recovered by B. P. Gooch, on said nineteenth November, 1875, in said court, for the sum of thirty-five dollars, with interest, and twenty-nine dollars and thirty cents costs.

Twentieth. A judgment recovered by Abraham Sims, who sues for George Sims, on —— November, 1875, in the circuit court of Augusta county, Virginia, for the sum of one hundred and
95 twenty-five dollars, with interest from tenth November, 1875, and ten dollars and twenty-nine cents costs. And also—

A judgment recovered by Henry Coleman and P. Marshall, on said —— day of November, 1875, in said court, for the sum of one hundred and fifteen dollars, with interest from twenty-ninth May, 1875, and nine dollars and fifty-one cents costs. And also—

A judgment recovered by S. M. Davidson, on said —— November, 1875, in said court, for the sum of seven hundred and twenty dollars, with interest from eleventh November, 1875, and ten dollars and thirteen cents costs.

Twenty-first. A judgment recovered by John Price, on the —— December, 1875, in the county court of Kanawha county, West Virginia, for the sum of forty-three dollars and seventy-five cents, with interest from seventh January, 1876, and forty-three dollars and fifteen cents costs. And also—

A judgment recovered by Lewis Taylor, on said —— day of December, 1875, in said court, for the sum of nineteen dollars and

seventy-one cents, with interest from twelfth January, 1876, and twenty-four dollars and eighty-five cents costs.

Twenty-second. A judgment recovered by John H. Bibb, on the ——February, 1876, in the circuit court of Albemarle county, Virginia, for the sum of one hundred and eleven dollars and fifty-three cents, with interest from 20th October, 1875, and eight dollars and ninety-six cents costs.

Twenty-third. A judgment recovered by John W. Smith, on the twenty-sixth April, 1876, in the circuit court of Bath county, Virginia, for the sum of sixty dollars, with interest thereon from said twenty-sixth April, 1876, and ——— costs.

Twenty-fourth. A judgment recovered by John J. Estes, on the sixteenth June, 1876, in the county court of Putnam county, West Virginia, for the sum of forty dollars, with interest, and forty-seven dollars and thirty-six cents costs. Also—

A judgment recovered by M. S. Kirtley, on said sixteenth
96 June, 1876, in said court, for the sum of one hundred and thirty-nine dollars and fifty cents, with interest, and thirty-five dollars and thirty-six cents costs. Also—

A judgment recovered by Alexander Thacker, on seventeenth June, 1876, in said court, for the sum of forty dollars, with interest, and twenty-six dollars and sixteen cents costs. And also—

A judgment recovered by John Atkins, on said seventeenth June, 1876, in said court, for the sum of thirty dollars, with interest, and twenty-four dollars and eighty-six cents costs.

XII. That Franklin Stearns has a specific lien upon a part of the mortgaged premises in question, as found and stated by the master commissioner, upon certain property of the said defendant, the Chesapeake and Ohio Railroad Company, described in the report of the said commissioner and the accompanying account, for the purchase-money thereof, to the amount of sixteen thousand four hundred and eighty dollars, which lien has heretofore, by an interlocutory order in this cause, been directed by this court to be paid by the receiver.

That R. L. Parish, as executor of William Scott, has a specific lien upon a part of the mortgaged premises in question, as stated and set forth in the said commissioner's report, upon certain premises of the said defendant company situated in the county of Alleghany, to secure the purchase-money for a certain right of way therein specified, amounting to the sum of fifteen hundred and forty-two dollars and sixty seven cents, which sum, by an interlocutory order heretofore made by this court, the said receiver has been directed to pay and discharge in satisfaction of the said lien.

That William O. Snelling has a specific lien upon a part of the mortgaged premises in question, as stated and set forth in the said commissioner's report, on certain premises of the said defendant company situated in the city of Richmond, in Henrico county, for the sum of twenty-one hundred and fifty-five dollars and sixty-seven

cents, to secure the purchase-money for a certain right of way
97 therein described, and which said sum the said receiver, by an interlocutory order heretofore made in this cause by this

court, has also been directed to pay and discharge in satisfaction of the said lien. That there is now pending in the circuit court of Henrico county a suit instituted before the proceedings in this cause were commenced, wherein J. T. Boston & Co. assert a claim for a balance of five thousand five hundred and seventy-nine dollars and seventeen cents, exclusive of interest, for which amount they claim to be entitled, under the laws of Virginia, to a mechanic's lien upon said road; the said claim, however, is resisted and still undetermined, but will be heard and determined before the sale hereinafter provided for.

That there is now due and unpaid in respect of certain claims specified in the said commissioner's report, which the said receiver has heretofore by an interlocutory order in this cause been directed to pay and discharge, the sum of fourteen thousand three hundred and fifty-seven dollars and nine cents.

That in addition to the indebtedness secured by the said mortgage to Duncan, Calhoun, Orton, and Maury, in the preceding eighth paragraph mentioned, there is due and secured by the same mortgage the sum of three thousand seven hundred and fifty dollars, with interest thereon from the first day of August, 1870, to be paid to the personal representatives of the said Maury, one of the trustees under the said trust deed, in pursuance of a decree heretofore rendered in favor of the said Maury, together with the costs thereon, amounting to four hundred and thirty-three dollars and sixty cents, as set forth in the said commissioner's report and accompanying account. All the indebtedness in this twelfth paragraph mentioned must be paid and satisfied before a conveyance to the purchaser under the sale hereinafter directed. That there is also now pending in the chancery court of the city of Richmond a suit instituted before the proceedings in this cause were commenced wherein Mary J. Wadsworth is asserting a lien under her judgment hereinbefore referred to, upon certain real estate of the defendant com-
98 pany in said bill mentioned. If the said claim shall be established, it must be paid and satisfied before a conveyance to the purchaser under the sale hereinafter directed or reserved as a lien upon the premises conveyed.

XIII. That there are certain unsettled and unadjusted claims for taxes made by the respective States of Virginia and West Virginia against the defendant, the Chesapeake and Ohio Railroad Company, all of which claims are in dispute and some of which are the subject of pending litigation, as more fully set forth in the said commissioner's report. If it shall hereafter be found that the defendant company is liable for the taxes so claimed, or any part thereof, such taxes will constitute a lien upon the property of the said company embraced in the trust deeds hereinbefore mentioned; but the amount and nature of such lien, if any, cannot at present be ascertained or defined, and to the extent, if any, that this lien may hereafter be found to exist, it will rank in priority before any of the liens upon the same premises hereinbefore specified.

There is, as appears by the master's report, a sum of eight thousand one hundred and thirty-eight dollars in controversy, the same

being made up by deductions from coupons of different classes of bonds, to meet a claim of the State of Virginia for taxes on such coupons, the validity of which tax is disputed. The premises must be sold subject to such lien for this sum as may be hereafter found and established and interest that may accrue thereon.

XIV. That the line of railroad of the Chesapeake and Ohio Railroad Company, so extending from a point on the James river to a point on the Ohio river, in Cabell county, in the State of West Virginia, as more fully described in the bill of complaint in this suit, and in the commissioner's report, is so located and situated, and every part thereof is so dependent in relation to every other part, including all and singular the rights, privileges and franchises of the said company embraced in the several deeds of trust hereinbefore mentioned, that no part thereof separately can be used
99 profitably or advantageously, and that no part thereof can be sold separately to advantage; but, on the contrary, a sale thereof in parcels would be much less productive than a sale of the whole line, and of all such franchises, etc., as an entirety, and would for that reason be prejudicial to the interests of the several creditors and classes of creditors entitled to share in the *the* proceeds of sale in the order of priority hereinbefore established.

That so much of the property of the said Chesapeake and Ohio Railroad Company as is included in the part of the said line of road, with its appurtenances, and all rights and franchises appertaining thereto, extending from the depot of the company, in Richmond, to the present terminus on the James river, and in the various other premises, rights, and franchises embraced in the trust deed, in the tenth paragraph mentioned, and not embraced in any of the liens prior thereto, as more fully set forth in the commissioner's report, does, as in said report is found and stated, in respect of value, stand in relation to the whole line of railroad and property of the said company, in the ratio and proportion of ten to ninety, after the payment and satisfaction of all liens upon the premises, and every part thereof, prior to the liens of the two mortgages in paragraphs nine and ten mentioned; and that on a sale of the mortgaged premises as an entirety, one-tenth part of the remaining proceeds of sale, after satisfying the liens prior to those in the said ninth and tenth paragraphs mentioned, should be taken and assumed to be the proceeds of sale of that part of the said line, and its aforesaid appurtenances, extending from the said depot to the said point on the James river, and of all and singular the other property, rights, privileges, and franchises embraced in the trust deed in the said tenth paragraph mentioned, and not embraced in the trust deeds in the said ninth and preceding paragraphs mentioned; and that nine-tenths of such remaining proceeds of sale should be taken to be the proceeds of the sale of all and singular the other part of the said line and premises in question.

It is therefore ordered, adjudged, and decreed that in the
100 distribution of the proceeds of the sale hereinafter directed to be made of all and singular the premises in question as an entirety, the ratio and proportion here declared and established be ob-

served in the distribution of any proceeds of sale that may remain for distribution among creditors entitled to share in the proceeds of sale in respect of the liens found and established in the ninth and tenth paragraphs of this decree, after satisfying prior liens in the order established by this decree.

XV. It is further ordered, adjudged, and decreed that the several persons and corporations having liens upon the premises or some part thereof, as hereinbefore found, stated, and established, are severally and respectively entitled to enforce their said liens by a sale according to the usual course and practice of the court; and the said defendant, the Chesapeake and Ohio Railroad Company, has filed in this cause an express waiver in writing of a day for payment, and has therein and thereby consented to the sale of the entire line of the road and mortgaged premises as an entirety at such time as this court may deed proper to direct.

XVI. It is further ordered, adjudged, and decreed that at any time prior to the sale of the premises hereinafter directed to be made, any person, persons, or corporation in whose favor a lien on the premises, or any part thereof, is established by this decree, their successors or assigns, may redeem any lien or liens prior to his or their lien; and in case of such redemption, the person, persons, or corporation so redeeming shall be subrogated to all and singular the rights of the person, persons, or corporation under this decree whose lien has been so redeemed, and shall stand in the place of such person or corporation in the distribution of the proceeds of sale.

XVII. And whereas, the premises considered, it appears to and is found by this court that the premises cannot be otherwise sold to advantage and without prejudice to the interest of the several liens and the beneficiaries thereunder, it is further ordered, adjudged, and decreed that all and singular the premises embraced in the mortgage to the board of public works in the fifth paragraph
101 of this decree mentioned, including the rights, privileges, and franchises embraced in the said mortgage; all and singular the premises, right, privileges and franchises included and conveyed in and by the said trust deed to H. W. Fry, William H. MacFarland, and James Lyons in the sixth paragraph of this decree mentioned; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the said trust deed to John B. Young and Robert R. Howison in the seventh paragraph of this decree mentioned; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the said trust deed to Philo C. Calhoun, William Butler Duncan, William Orton, and Matthew F. Maury in the eighth paragraph of this decree mentioned; all and singular the premises, right, privileges, and franchises included and conveyed in and by the trust deed to Philo C. Calhoun and William Butler Duncan in the ninth paragraph of this decree mentioned; and all and singular the premises, rights, privileges, and franchises included and conveyed in and by the said trust deed to the said Philo C. Calhoun and William K. Kitchen, trustees, in the tenth paragraph of this decree mentioned, be sold as an entirety, free and discharged of and from the liens

and incumbrances of the said several mortgages and deeds of trust, and of and from each and every one of the said deeds of trust or mortgages in this paragraph mentioned; and free and discharged of and from all and singular the liens of every kind and description hereinbefore found and recited, except the liens for taxes hereinbefore referred to, if any such liens shall be hereafter established; and that when the sale herein ordered shall have been made and approved by this court, all equities of redemption of the various lien-holders in the order of their subordination, and of the defendant company, the Chesapeake and Ohio Railroad Company, shall be forever determined and barred.

XVIII. It is further ordered, adjudged, and decreed that Williams C. Wickham, the receiver in this cause, be, and he is hereby, appointed a commissioner to make the sale provided for and directed in the last preceding paragraph in conformity to the
102 directions herein contained, and before entering upon the performance of his duties he shall execute and file with the clerk of this court a bond in the penal sum of two hundred and twenty-five thousand dollars, with surety or sureties to be approved by this court, conditioned for the faithful performance of his duties in the premises. Such sale shall be made by the said commissioner, at Richmond, in the State of Virginia, and he shall give notice of the time, place, and terms of such sale, by an advertisement thereof, to be inserted once in each week, for not less than ninety days before such sale, in at least one newspaper published in each of the cities of Richmond, Virginia; Charleston, West Virginia; in the cities of Baltimore, Maryland; Washington, D. C., and in the city of New York.

And the said commissioner shall also serve notice of such sale—the time, place, and terms thereof—upon the board of public works of the State of Virginia, at least ninety days before the day fixed for such sale.

XIX. It is further ordered, adjudged, and decreed that the terms upon which the said commissioner shall expose the premises for sale are and shall be as follows, that is to say:

The purchaser shall pay on the day of sale, or within such short time thereafter as the commissioner may designate, not exceeding ninety days, the sum of two hundred thousand dollars in cash.

The cash so to be paid shall be applicable to the payment of the interest due and accrued at the date of its payment on the obligations of the said Virginia Central Railroad Company, and to such other purposes as the same may be properly applied under the orders of the court; and any sums so paid in the meantime by the receiver out of any earnings of the road after the day of sale, and any sums which at the expiration of the said ninety days he may have in hand, shall be deducted from the amount so required to be paid in cash.

For so much of the purchase-money as shall be equal to the balance of the said interest due and accrued on the said obligations of the Virginia Central Railroad Company at the date of the
103 trust deed hereinafter directed to be made for the security thereof and then unpaid and unprovided for, the commis-

sioner shall allow a credit of three years in equal annual instalments, with interest at the rate of six per centum per annum, payable semi-annually.

For the sum of four hundred and eighty-seven thousand five hundred and seventy-eight dollars and ninety cents, representing the principal sum due under the trust deed to John B. Young and Robert R. Howison, in the seventh paragraph of this decree mentioned, and the principal of the several sums found and stated to be due in the eighth paragraph of this decree, and for any additional sum which may hereafter be found due on account of any of the claims in said eighth paragraph mentioned, which are still undetermined, the commissioner shall allow a credit of five years from the date of sale, with interest at the rate of six per cent. per annum, payable semi-annually.

For the further sum of one million eighteen thousand dollars, representing the amounts found and stated in the sixth paragraph of this decree to be the principal outstanding under the mortgage to the said H. W. Fry, W. H. MacFarland, and James Lyons, and under the mortgage to the board of public works in the fifth paragraph hereof mentioned, the commissioner shall allow a credit from the date of sale until the first day of July, 1887, with interest at the rate of six per centum per annum, payable semi-annually.

The payment of the said several sums, in respect of which credit is to be allowed, as in this paragraph before stated, and the interest thereon, and the bonds hereinafter provided for, shall be secured under and by a trust deed of all and singular the premises sold under this decree, and constituting a first lien thereon, to be executed and delivered to a trustee or trustees to be appointed by the court simultaneously with the delivery of the conveyance of the premises to the purchaser, which trust deed shall by its terms maintain and preserve all existing priorities of lien as between the different classes of bonds of the said Virginia Central Railroad Company,
as in this decree found and stated. Appropriate and conven-
104 ient obligations, representing the several sums in respect of
which credit is so to be given as aforesaid, shall be created, issued, and delivered to the several creditors entitled to receive the same; and in case of any disagreement as to the form and tenor thereof, the same shall be settled and prescribed by the court on application.

In order to enable the purchaser or purchasers, his or their representatives or assigns, if he or they shall so elect, to anticipate the payment of the said several sums in respect of which credit is to be allowed, as herein provided, or any part thereof, and to provide for the reimbursement of sums paid in respect of the indebtedness of the Virginia Central Railroad Company, the several specific liens herein found, and the expenses of this cause, he or they may create and issue, from time to time, under the said deed of trust, and to be secured by the lien thereof, as hereinafter provided, his or their bonds to such an amount not exceeding in the aggregate the aggregate amount of the existing indebtedness of the Virginia Central Railroad Company herein found and stated, and the amount of such

specific liens and expenses, with interest accrued and to accrue thereon, and of such denominations and tenor as he or they may determine.

The said bonds shall stand secured by and under the lien of the said deed of trust when and to the extent that the same shall be endorsed with the certificate of the said trustee to that effect; and the said trustee shall, when requested, so endorse and deliver the same to the extent and amount that the said indebtedness of the Virginia Central Railroad Company, and such other indebtedness for which bonds may be created, shall have been previously paid off and satisfied, or upon the receipt by him of the par value of the bonds so endorsed and delivered, with accrued interest to the time of the delivery, in cash, or upon the surrender to him of an equivalent amount in said obligations herein required to be given to the several creditors of the Virginia Central Railroad Company for that part of the purchase-money for which credit is to be allowed, and so as aforesaid to be secured under the said trust deed or the other indebtedness.

105 The proceeds of the said bonds so paid into the hands of the said trustee in cash shall be applied by him as soon as practicable thereafter to the purchase or redemption of the said obligations secured by the said deed of trust at a price not exceeding par and accrued interest, and the said obligations when so surrendered to or redeemed by him shall be cancelled.

When all of the said purchase-money secured by the said deed of trust, in respect of which credit is given as aforesaid, shall have been paid, and the obligations representing the same extinguished, and the expenses of the trust shall have been paid, all of such bonds then remaining in the hands of the trustee shall be surrendered, and any balance of the proceeds of bonds remaining in his hands shall be paid over.

The net revenues and earnings of the property accruing between the date of such sale and the conveyance of possession to the purchaser or purchaser, his or their representatives or assigns, not otherwise disposed of in pursuance of the orders of the court made, or that may hereafter be made, shall be appropriated and applied under the direction of the court by the receiver, for the benefit of the purchaser or purchasers, his or their representatives or assigns, and in the first place towards the payment and discharge of that part of the purchase-money above mentioned applicable to the payment and satisfaction of the past due interest on bonds of the Virginia Central Railroad Company secured by the deeds of trust in the fifth, sixth, seventh, and eighth paragraphs mentioned, or towards the payment of any installments of interest that may become due and payable between the date of sale and the transfer and conveyance of the property to the purchaser in such order as the court may direct.

In case the premises herein directed to be sold shall not sell for a sum sufficient to pay and satisfy all the liens thereon, as herein found and established, but shall sell for a sum that will leave a balance after the payment of the liens prior to those in the ninth and

tenth paragraphs mentioned, for such balance of purchase-
106 money as may be applicable to the payment of over-due interest on the bonds secured by the trust deeds in the said paragraphs respectively mentioned, in the ratio and proportion by this decree established, the purchaser shall be entitled to a credit of twelve years from the date of sale. *Provided*, however, that the said commissioner shall receive from such purchaser or purchasers, his or their representatives or assigns, interest coupons of the bonds in the said ninth and tenth paragraphs mentioned, in payment at such rate per centum of the par value of the said coupons as will be payable to the holder of such coupons upon the distribution of the proceeds of sale under the priorities of lien, as by this decree settled and determined.

For that portion of the purchase-money, if any, applicable to the payment of the principal of bonds outstanding and secured by the said last-mentioned deeds of trust respectively, in the ratio and proportion herein and hereby established, the purchaser or purchasers, his or their representatives or assigns, shall be entitled to a credit for such part thereof as will be due and payable in respect of each class of bonds for a period of time corresponding to the time which each class respectively has yet to run before the maturity thereof.

In case nine-tenths of such part of the purchase-money should amount to a sum more than sufficient to pay the amount of bonds outstanding under the trust deed in the said ninth paragraph mentioned, the surplus shall be applicable to the payment of the balance of principal due in respect of bonds secured under the trust deed in the said tenth paragraph mentioned.

That portion of the purchase-money, if any, applicable to the payment of the interest due at the date of sale, and of the principal under the said two last mentioned trust deeds in respect of which credit is given, or so much thereof as may remain outstanding and unprovided for at the date of the conveyance to the purchaser, must be secured by a trust deed or mortgage ranking next in priority after the liens to be created in pursuance of this decree for the security of the deferred payments hereinbefore provided for, which mort-
107 gage or deed of trust must be for the common security of bondholders under the trust deeds in the ninth and tenth paragraphs of this decree, in the ratio and proportion hereinbefore established; and interest on the sum for which credit is allowed as aforesaid must be paid semi-annually, at the rate of six per cent. per annum, at such time as the court shall direct; the said mortgage or trust deed to be approved by the court.

If the premises should sell for a sum more than sufficient to pay and satisfy all the liens herein found and established prior to the judgment liens, the surplus must be paid by the purchaser in cash, to be disposed of under the orders of this court according to law.

If the sale shall be approved by the court upon the commissioner's report thereof coming in, the same shall stand confirmed whenever and so soon as all of the terms of sale as specified in this decree shall have been complied with, and all acts shall have been done by this decree required to be done in order to entitle the purchaser

or purchasers, his or their representatives or assigns, to a conveyance of the premises. And upon such compliance and performance as aforesaid, and upon application and due proof thereof, and upon the assumption by the said purchaser or purchasers, his or their representatives or assigns, of all then outstanding lawful contracts and liabilities of the receiver, and upon indemnifying him against the same to the satisfaction of this court in and by the deed or deeds next hereinafter referred to, or in such other manner as the court may hereafter determine, the court will order a conveyance of title to and transfer of possession of all and singular the premises to the purchaser or purchasers, or his or their representatives or assigns, upon the execution by such purchaser or purchasers, his or their representatives or assigns, contemporaneously with such conveyance, and to the satisfaction of this court, of a mortgage or mortgages or trust deed or deeds of all and singular the premises so sold and purchased for the security of all deferred payments and the interest thereafter to accrue thereon as required by this decree.

108 The purchaser shall be at liberty to anticipate the payment of any or all sums required by this decree to be paid.

The said commissioner shall deposit all moneys coming into his hands under this decree as soon as may be after the receipt thereof in the First National Bank of Richmond, Virginia, to the credit of this cause, and file with the papers a certificate thereof.

Inasmuch as the nature and extent of the lien upon the premises for taxes, if any there be, cannot now be ascertained, such sale must be made subject to any such liens now existing for taxes, but it will be the duty of the commissioner to give the purchaser the fullest and most reliable information concerning such taxes and lien that he may be able to acquire in the meantime.

The fees of the said commissioner for making such sale and the performance of the duties imposed by this decree shall be five thousand dollars.

XX. It is further ordered, adjudged, and decreed that the purchaser or purchasers at such sale, or his or their representatives or assigns, may pay any part of the purchase-money not required to be paid in cash in any of the outstanding bonds or interest coupons, secured by the several mortgages or deeds of trust in this decree mentioned, at such rate per centum of the par value of said bonds and coupons, with the interest that may be due and payable thereon, as in the opinion of said commissioner will be payable in respect of such bonds or coupons, upon the distribution of the proceeds of such sale under the priorities of lien as settled and determined by this judgment and decree; and if any question shall arise as to the rate and amount at and for which such bonds and coupons shall be received, leave is given to apply to this court upon the foot of this decree. At such sale, as between bidders whose bids are otherwise of equal value, the commissioner shall receive the bid of the purchaser or purchasers who are ready and willing to pay the largest proportion of their bids in cash or its equivalent; that

109 is to say, the bonds and coupons which he is authorized to receive, in addition to the amount of cash hereinbefore required to be paid by the purchaser.

XXI. It is further ordered, adjudged, and decreed that out of the proceeds of sale, or by the receiver, as this court may hereafter direct, there shall be paid to James Lyons, surviving trustee, in the mortgage or trust deed in the sixth paragraph of this decree found and established, the sum of five thousand dollars, in full compensation and payment for all services rendered, and expenses incurred for counsel fees or otherwise, by him as trustee in respect of the said trust and trust deed hereinbefore mentioned.

That out of said proceeds of sale, or by the receiver, as this court may hereafter direct, there shall be paid to John B. Young, for fees as counsel in this cause, the sum of two thousand dollars; to John B. Young and Robert R. Howison, trustees in the mortgage or trust deed in the seventh paragraph of this decree found and established, the sum of five hundred dollars, in full compensation and payment for all services rendered and expenses incurred for counsel fees or otherwise by them as trustees in respect of the said trust or trust deed herein last above mentioned. That out of said proceeds of sale, or by the receiver, as this court may hereafter direct, there shall be paid to Page and Maury, attorneys for William Orton, trustee, the sum of five hundred dollars for fees as counsel.

And it is further ordered, adjudged, and decreed that all questions concerning the distribution of the cash required to be paid by the purchaser on such sale, and of such part of the purchase-money as may subsequently be paid in pursuance of this decree, prior to the conveyance and transfer of the property to the said purchaser in the manner and upon the conditions hereinbefore provided, all questions as to the compensation, fees, and expenses of the several other trustees mentioned in this decree, and as to fees and allowances of and to counsel, solicitors, and attorneys, and all other questions that may arise concerning the premises not hereinbefore disposed of, be reserved for settlement, leave being hereby given to any party in interest to apply from time to time for that purpose.

XXII. After such sale the said commissioner is directed to report his acts and doings in the premises with all convenient speed to this court, and no sale under this decree shall be effective to pass any right, title, or interest in the premises until the same shall have been approved by this court, nor shall the purchaser be entitled to possession of the premises until the provisions of this decree and all its requirements shall have been complied with; all fees, costs, and expenses shall have been paid, together with all sums found and stated herein to be due, or that may be ascertained to be due, and in respect of which credit is not allowed, and the court shall have ordered the receiver to surrender such possession to the purchaser.

In case of any failure on the part of the purchaser or purchasers, or his or their representatives or assigns, at any time to comply with any of the terms of sale, the commissioner is directed to apply to this court for further directions in the premises, and any party interested may also apply if so advised.

XXIII. Whereas a part of the line of road, franchises, lands, and other property herein directed to be sold is situated in the State of

West Virginia, and an action for foreclosure, in all substantial respects the same as this action, is now pending in the circuit court of Kanawha county, in said State, no sale shall be made under and in pursuance of this decree until and unless the said circuit court shall make in the said action there pending a decree in substance of like tenor and effect, adopting and confirming the provisions of this decree. Nor shall any sale of the premises be approved and finally confirmed until or unless the same shall be approved and finally confirmed by the said circuit court.

A copy. Teste: ALFRED SHEILD, *Clerk.*

111 CHES. & OHIO RAILWAY CO. *vs.* JOSEPH S. MILLER, Auditor.

Exhibit "E."
A copy. Teste: SAMUEL B. McCOLLOCH, *Clerk.*

EXHIBIT E.

STATE OF WEST VIRGINIA:

In the Circuit Court of Kanawha County, 18th of December, 1877.
In Chancery.

WILLIAM BUTLER DUNCAN and PHILO C. CALHOUN, as Trustees, Complainants,
against
THE CHESAPEAKE AND OHIO RAILROAD COMPANY and others, Defendants.

Decree.

New York: Evening Post Steam Presses, 208 Broadway, corner Fulton. 1877.

STATE OF WEST VIRGINIA:

In the Circuit Court of Kanawha County, 18th December, 1877.

WILLIAM BUTLER DUNCAN and PHILO C. CALHOUN, as Trustees, Complainants,
against
THE CHESAPEAKE AND OHIO RAILROAD COMPANY, The Board of Public Works of the State of Virginia, John B. Young, and Robert R. Howison, Trustees; William Butler Duncan, Philo C. Calhoun, and William Orton, surviving Trustees; James Lyons, sole surviving Trustee, and Philo C. Calhoun, Trustee, John Castree, substituted Trustee, and others, Defendants. } In Chancery.

This cause coming on to be heard upon the record, exhibits, and papers therein, heretofore filed, noticed, and read, and upon the report of thr master commissioner hereinbefore duly appointed, filed on the 25th day of January, 1877, and the supplemental report of

said commissioner, filed on the 17th day of Dec'r, 1877, and
112 to which reports no exception has been taken, the respective parties having appeared and having been duly heard, by counsel:

And whereas it appears that a part of the line of railroad, franchises, lands, and other property embraced in the several deeds of trust referred to in the bill of complaint, and the said trustee's report, are situate in the State of Virginia;

And whereas it also appears that a like suit between the same parties, brought for the same purpose, is pending in the circuit court of the city of Richmond; that in the said action the said circuit court, on reports of its master commissioner, in all respects the same in substance as the reports filed herein, has made and rendered a decree and judgment for the foreclosure and sale of all and singular the premises, in which decree and judgment it is, among other things, provided as follows, that is to say:

"Whereas a part of the line of railroad franchises, lands, and other property herein directed to be sold, are situate in the State of West Virginia, and a suit for foreclosure, in all substantial respects the same as this suit, is now pending in the circuit court of Kanawha county, in said State, no sale shall be made under and in pursuance of this decree until and unless the said circuit court shall make in the said action there pending a decree in substance of like tenor and effect, adopting and confirming the provisions of this decree; nor shall any sale of the premises be approved and finally confirmed until or unless the same shall be approved and finally confirmed by the said circuit court."

And now, the said premises having been fully considered and due deliberation had, it is ordered, adjudged, and decreed that the said judgment and decree *that* the said circuit court of the city of Richmond, as the same has been modified by decrees subsequently entered by said court, be, and the same is hereby, approved; and to the end that full effect may be given to the same according to the true intent and meaning thereof, or as near as may be, this court, in pursuance of the tenor and effect of the said decree, and of the
113 said decrees subsequently entered in the same suit, doth further order, adjudge, and decree as follows, that is to say:

I. That the said reports of the said master commissioner be, and the same hereby are, in all things confirmed, and the facts therein stated are found and adjudged to be true.

II. That all and singular the facts stated in the bill of complaint as to the creation and organization of the defendant, the Chesapeake and Ohio Railroad Company, and as to the franchises and property acquired and possessed by the said defendant company are true.

III. That the mortgaged premises, whereof the said bill of complaint contains a general description, consist, in addition to the franchises, rights and privileges appertaining to the said defendant company, of all and singular the premises and property specified in the receiver's inventory heretofore filed in this cause, with such changes and modifications therein and thereof as are stated and specified in the deposition of the receiver referred to in the master's report and

made part thereof, together with all property of every kind embraced in the said master's report of assets.

IV. That all the indebtedness, to secure which the Virginia Central Railroad Company executed and delived a deed of trust to James Lyons, H. W. Fry and William H. MacFarland, as trustees, bearing date the tenth day of December, one thousand eight hundred and fifty-one, was, before the filing of the bill of complaint in this action, fully paid and satisfied; and that the estate conveyed by the said deed to the said trustees should be conveyed and released to the said Chesapeake and Ohio Railroad Company as the successor to all the right, title and interest of the said Virginia Central Railroad Company in and to the premises, such release and conveyance to inure to the benefit and advantage of the several incumbrances hereinafter mentioned in the due order of their respective priorities; and the said James Lyons, the surviving trustee
114 under the said deed, is hereby directed to make such release and conveyance with all convenient speed, and report his action in the premises to this court.

V. That the mortgage executed and delivered by the Virginia Central Railroad Company to the Board of Public Works of the State of Virginia, dated April first, one thousand eight hundred and fifty, is a subsisting and first lien, for the purpose therein specified, on all and singular the premises embraced in the description thereof contained in the said mortgage; that is to say, the railroad of the said Virginia Central Railroad Company, possessed by the said Company at the date of the said mortgage, together with the lands heretofore acquired by the said company for the said road; that the principal of the bonds of the said company to the amount of one hundred thousand dollars in the aggregate was guaranteed by the State, as contemplated and provided for in the said mortgage; that the whole amount of the bonds so issued by the said company and guaranteed by the State are outstanding and unpaid; that seventy thousand dollars in amount thereof are payable on the first day of April, one thousand eight hundred and eighty, and thirty thousand dollars in amount thereof are payable on the first day of July, one thousand eight hundred and eighty.

That the whole amount of interest which had accrued and become due and payable on the said bonds so issued and guaranteed, on and prior to the first day of January, 1877, and which still remains due and unpaid, was and is the sum of sixteen thousand six hundred and forty-one dollars.

And whereas it appears to this court that the premises hereinafter directed to be sold will sell to better advantage if the same are sold free from the incumbrance of the lien created by the said mortgage, and that the premises can be so sold without prejudice to the said Board of Public Works of the State of Virginia, it is, therefore, ordered, adjudged and decreed that whenthe premises hereinafter directed to be sold shall be sold in pursuance of this decree,
115 the same and every part thereof shall be sold free and discharged of and from the said lien; but as one of the conditions of the said sale and of the confirmation thereof, the pur-

chaser or purchasers, his or their representatives or assigns, shall be required to, and shall in fact and simultaneously with the conveyance of the premises to the said purchaser or purchasers, his or their representatives or assigns, execute and deliver a deed of trust for the security of the said indebtedness as hereinafter particularly directed, to be approved by this court, of the same premises now embraced in the said mortgage, which mortgage or deed of trust shall, in like manner as the said existing mortgage, constitute a first lien upon the said premises.

VI. That the trust deed executed and delivered by the said Virginia Central Railroad Company to H. W. Fry, W. H. MacFarland, and James Lyons, trustees, dated June 2d, 1854, constitutes a lien upon the railroad and other premises specified therein, which said lien is next in order of priority to the lien in the last preceding paragraph mentioned. That of the bonds of the said Virginia Central Railroad Company, issued under under and in pursuance of the said deed of trust, and intended to be secured thereby, there are now outstanding and unpaid bonds to the amount of nine hundred and eighteen thousand dollars ($918,000), the principal of which bonds will become due and payable on the first day of July, one thousand eight hundred and eighty-four. That the whole amount of interest which had accrued and become due and payable on the said bonds on and prior to the first day of January, one thousand eight hundred and seventy-seven, and which still remains due and unpaid, was and is the sum of hundred and fifty-eight thousand eight hundred and twenty dollars, represented by interest coupons, and the further sum of fifteen thousand nine hundred and fifty-nine dollars and ninety cents of interest which has accrued upon said coupons, and the further sum of three thousand three hundred and sixty dollars interest which has accrued upon registered bonds, amounting in the aggregate to the sum of one hundred and seventy-eight thousand one hundred and thirty-nine dollars and ninety cents.

116 VII. That the trust deed of the said Virginia Central Railroad Company executed and delivered to John B. Young and Robert R. Howison, trustees, dated the sixth day of February, one thousand eight hundred and sixty-six, constitutes a lien upon the railroad and other premises specified therein, which said lien is next in order of priority to the lien in the last preceding paragraph mentioned; that of the bonds issued by the said company under and in pursuance of the said deed of trust, and intended to be secured thereby, there are now outstanding and unpaid bonds to the amount of three hundred thousand dollars ($300,000). That the said bonds became due and payable on the first day of January, one thousand eight hundred and seventy-six; the amount of interest that had accrued and become due and payable on the said bonds on and prior to the first day of January, one thousand eight hundred and seventy-seven, and which still remains due and unpaid, was and is the sum of sixty-nine thousand four hundred and forty dollars, represented by interest coupons, and the further sum of five thousand two hundred and twelve dollars and eighty cents interest, which, at the date last aforesaid, had accrued upon the said coupons, amounting in

the aggregate to seventy-four thousand six hundred and fifty-two dollars and eighty cents.

VIII. That in and by the contract of the 31st of August, 1868, authorized by statute and made part of the charter of the Chesapeake and Ohio Railroad Company, it was, and is, among other things, provided as follows: "Nothing contained in any contract made by this company shall have the effect to deprive the present creditors of the company of their claims for satisfaction out of the present property of the company; and it shall be the duty of the president and directors, before executing any further lien on the present property of the company, to secure by mortgage any portion of the funded or floating debt not heretofore so secured that cannot be promptly paid off in the ordinary administration of the affairs of the company."

117 In pursuance of this requirement it was and is provided, in the trust deed executed and delivered to Philo C. Calhoun, William Butler Duncan, William Orton, and Matthew F. Maury, dated the first day of October, one thousand eight hundred and sixty-eight, that the payment and performance of all and singular the obligations and liabilities of the said Virginia Central Railroad Company, above referred to, should be secured by the said deed of trust; that of the obligations and liabilities so secured to be paid and performed there are now outstanding and unpaid the following, that is to say:

First. Certain bonds issued by the Virginia Central Railroad Company, and dated October 1st, 1851, and payable October 1st, 1866, to the amount in the aggregate of three thousand and two dollars and ninety cents ($3,002.90), with interest accrued thereon prior to the first day of January, 1877, and then due to the amount of three thousand and sixteen dollars and sixty-four cents.

Second. Certain other bonds issued by the said Virginia Central Railroad Company, dated October fifteenth, 1853, and payable October fifteenth, 1875, amounting in the aggregate to twenty-one thousand seven hundred and sixty dollars ($21,760), with interest accrued thereon prior to the first day of January, 1877, and due on that day to the amount of eight thousand seven hundred and eighteen dollars and seventy cents.

Third. Certain other bonds issued by the Virginia Central Railroad Company, dated July 1st, 1855, payable July 1st, 1865, amounting in the aggregate to seventeen hundred and seventy-six dollars ($1,776), with interest accrued thereon prior to the first day of January, 1877, and due on that day to the amount of seventeen hundred and five dollars and thirty-four cents.

Fourth. Certain other bonds issued by the said Virginia Central Railroad Company in the months of July, August, September, and October, respectively, 1861, payable in one and two years, respectively, after date of issue, amounting in the aggregate to five hundred and forty dollars ($540), with interest accrued thereon prior to January first, 1877, and due at that date to the amount of four hundred and ninety-four dollars and ten cents.

118 Fifth. Certain other bonds issued by the said Virginia Central Railroad Company, payable January first, 1877, with interest at the rate of eight per cent. per annum, payable semi-annually, on the first day of January and of July in each year, amounting in the aggregate to one hundred and sixty thousand five hundred dollars ($160,500), with interest thereon accrued prior to the first day of January, 1877, and due on that day to the amount of forty-four thousand four hundred and eight dollars, represented by interest coupons, and the further sum of four thousand and nine dollars and thirty-two cents for interest which had accrued upon said coupons on the first day of January, 1877, amounting in the aggregate to forty-eight thousand four hundred and seventeen dollars and thirty-two cents.

Sixth. Certain unfunded indebtedness of the said Va. Central Railroad Company, amounting in the aggregate to the sum of eighteen thousand five hundred dollars of principal, due and payable as follows, that is to say: To H. M. Mathews, his personal representatives and assigns, the sum of $17,000, with interest thereon at the rate of six per centum per annum from the 1st day of October, 1873, until paid; and to Robert Stiles, assignee of A. T. Caperton, dec'd, his personal representatives and assigns, the sum of $1,500, with interest thereon at the rate of six per centum per annum from 31st day of October, 1868, until paid.

That the above and foregoing obligations of the Virginia Central Railroad Company, in this paragraph mentioned, constitute a lien upon all and singular the premises described in said trust deed in this paragraph before mentioned next in order of priority to the lien in the preceding seventh paragraph mentioned.

It further appears that the said Chesapeake and Ohio Railway Company conveyed to the said Calhoun, Duncan, Orton and Maury, in trust for the purposes therein mentioned, "all and singular the estate and property—real, personal, and mixed—and all fixtures, rights, privileges, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind held and owned or occupied by the said com-

119 pany, that is to say, all and singular the railroads or railways of said company from and including the terminus and depot at Richmond, in the county of Henrico, in the State of Virginia, and thence to the mouth of the Big Sandy river, on the Ohio river, including a proposed branch line from Charleston to Point Pleasant, in the State of West Virginia, together with all and singular the lands, tracks, lines, rails, bridges, ways, rights of way and materials, buildings, piers, wharves, erections, fences, walls, fixtures, privileges, franchises, rights and interests, real estate, personal property, choses in action, leasehold and other things of and belonging to said company of every kind, nature and character in either of the said States of Virginia or West Virginia, and all the tolls, income, issues and profits to be had or derived from the same, or any part or portion thereof, or from any part or portion of said term or terms, or either thereof, and all the right to receive or recover the same, and all railway stations and depots, with all the appurtenances necessary or

convenient for the sole, complete and entire use and operation, as well as maintenance, of the said roads or railways owned or leased by the said company, and also all the locomotives, engines, tenders, cars, carriages, tools and machinery belonging or appertaining to said railroads and railways so owned as aforesaid, and all improvements or additions made or to be made to any or all of said properties, estates, railroads or railways, and their appurtenances, by said party of the first part or by others; also all and every other estate, interest, property or thing which the said party of the first part own and hold, or may and shall hereafter acquire and hold, necessary or convenient for the use, occupation, operation and enjoyment of all or any of its said railroads, railways, leases and property, rights, privileges and franchises, or any part or portion thereof, and also all the rights and privileges to use the said road beds, tracks, sidings, turn-outs and switches constructed at the execution of these presents, or which may and shall be hereafter constructed for the convenient use of said railroads or railways, or any of them owned or
120 operated by said first party, as fully and as effectually as the said company, party of the first part, is or may be by law entitled to have or acquire."

That said Chesapeake and Ohio Railroad Company issued under and in pursuance of the said deed of trust certain of its own bonds, all of which were afterwards retired.

Bonds under this deed of trust to the amount of seven thousand dollars ($7,000), not negotiated or sold, were delivered to Dean, McGinnis & Co., agents for the Chesapeake and Ohio Railroad Company, for sale, as the said company claims. These bonds were dated October first, 1868, and were payable October first, 1898, with interest in the meantime at the rate of seven per cent. per annum, payable semi-annually on the first day of April and the first day of October in each year, principal and interest payable in United States gold coin.

The said bonds, to the amount of seven thousand dollars ($7,000), are still outstanding in the hands of the said agents, who still hold possession thereof under some claim of right or title therein or thereto, which claim is denied by the said company. Unless the validity of this claim shall have been determined by this court, and the lien of these bonds, if any, discharged or provided for prior to the sale herein directed, the purchaser will be required to deposit in this court the amount of the principal and accrued interest of said bonds to await such determination.

IX. That on the fifteenth day of January, 1870, the defendant, the said Chesapeake and Ohio Railroad Company, executed and delivered a deed of trust to William Butler Duncan and Philo C. Calhoun, trustees, wherein and whereby the said company conveyed to the said trustees the premises in the said deed, described as follows, that is to say: "The following property, part of which is now constructed and part to be hereafter constructed, purchased, acquired, held, possessed, and owned by the said company, to wit, all that portion of the railroad and the railroad line of the said company, from and including the terminus and depot at Rich-

mond, in the State of Virginia, and thence to the mouth of the Big Sandy river, on the Ohio river, in the State of West Virginia, including all of said line of railroad now com-
121 pleted and in process of construction, as well as that portion of the same which may hereafter be constructed or completed, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, work-shops, machine-shops, buildings, bridges, tools, machinery, side-tracks, turn-outs, turn-tables, weighing scales, fixtures, locomotives, tenders, rolling-stock, fuel, equipments, and all other property which is necessarily or ordinarily used in operating the said railroad, and all rights and privileges of way and transit, and all other rights and privileges, which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company and pertaining to the said line of railroad, and all corporate rights, privileges, and franchises of said company, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim, and demand in law and in equity of the said parties of the first part of, in, and to the same, and every part and parcel thereof."

That under and in pursuance of the said trust deed the said company issued its bonds to the amount in the aggregate of fourteen million nine hundred and ninety-two thousand dollars ($14,992,000), all of which are dated the fifteenth day of January, 1870, payable in the gold coin of the United States on the first day of November, 1899, with interest in the meantime at the rate of six per cent. per annum, payable semi-annually on the first day of May and the first day of November in each year, in like gold coin. The bonds so issued are now outstanding and unpaid. The amount of interest accrued thereon prior to the first day of January, 1877, and which still remains unpaid, is the sum of three millions one hundred and sixty thousand and thirty-eight dollars, represented by interest coupons; and the further sum of three hundred and nine thousand two
122 hundred and ninety-four dollars and ninety-seven cents interest which had then accrued on said coupons; and the further sum of one hundred and ninety-six thousand four hundred and twenty dollars for interest which had then accrued on registered bonds, amounting in the aggregate to three million six hundred and sixty-five thousand seven hundred and fifty-two dollars and ninety-seven cents, payable in gold coin as aforesaid.

That this trust deed and the indebtedness secured thereby constitute a lien upon all and singular the premises described in the said deed next in priority after the lien specified in the last preceding paragraph.

X. That on the first day of October, 1872, the said Chesapeake and Ohio Railroad Company executed and delivered to the said Philo C. Calhoun and to William K. Kitchen, as trustees, a deed of

trust, wherein and whereby the said company did convey, for the purposes therein mentioned, to the said trustees all the right, title, and interest of the said company in and to the premises and property therein described, as follows, that is to say: "All that portion of the railroad and railroad line of the said company from the depot, in the city of Richmond, in the State of Virginia, extending down the peninsula between the James and York rivers to such point or points upon those rivers or upon Chesapeake Bay as may be selected by the company, and to which the line of railroad of said company may be located and constructed, including tunnel, wharves, right of way, and warehouses, and all lands necessary for the operation of that portion of the road; also upon the branch railroad and railroad line from the main line of the said company, near the mouth of Scary creek, in West Virginia, to the mouth of the Kanawha river, with all lands and properties necessary for the operation of said branch; and also upon the bridge to be erected across the Ohio river at the city of Huntington, in the State of West Virginia, including all of that portion of the extension of said line of railroad and branch above described now completed and in process of construction, as well as that portion of the same which may hereafter be constructed or completed, including therein the roadway and
123 track, together with all the superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, work shops, machine shops, buildings, bridges, tools, machinery, side-tracks, turn-outs, turn-tables, weighing scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all other property which is or will be necessarily or ordinarily used in operating the bridge and extension of the said railroad and the branch above described, and all rights and privileges of way and transit, and all other rights and privileges, which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company, and pertaining to said bridge, extension, and branch of the said line of railroad, and all corporate rights, privileges, and franchises of said company pertaining thereto, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim and demand in law and in equity of the said parties of the first part of, in, and to the same, and every part and parcel thereof. All that portion of the railroad and railroad line of the said company, from and including the depot at the city of Richmond, in the State of Virginia, and thence to the mouth of the Big Sandy river, on the Ohio river, in the State of West Virginia, or to such point on the Big Sandy river as shall be selected by the company, and to which the line of railroads of said company may be located and constructed, including all of the main line of railroad of said Company between the depot at Richmond, Virginia, and the Big Sandy river, in West Virginia, now completed and in process of construction, as well as that portion of the same which may hereafter be constructed or com-

pleted, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station houses, engine houses, car houses, freight houses, wood houses, sheds, watering places, work shops, machine shops, buildings, bridges, tools,
124 machinery, side tracks, turn-outs, turn-tables, weighing scales, fixtures, locomotives, tenders, rolling stock, fuel, equipments, and all other property which is or will be necessarily or ordinarily used in operating that portion of the said railroad last mentioned, and all rights and privileges of way and transit, and all other rights and privileges, which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company, and pertaining to that portion of the said line of railroad, and all corporate rights, privileges, and franchises of said company, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues, and profits thereof, with all the right, title, interest, estate, property, possession, claim, and demand in law and in equity of the said parties of the first part of, in, and to the same, and every part and parcel thereof."

That under and in pursuance of the said deed of trust the said company issued its bonds to the amount of twelve million one hundred and seventy-four thousand dollars ($12,174,000) dated the first day of October, 1872, and payable in gold coin of the United States on the first day of July, 1902, with interest thereon in the meantime at the rate of seven per cent. per annum, payable in like gold coin; that all the bonds so issued are outstanding and unpaid.

That prior to the first day of January, one thousand eight hundred and seventy-seven, there had accrued and was then due, and still remains unpaid, interest on the said bonds to the amount of three million one hundred and fourteen thousand seven hundred and ninety dollars, represented by interest coupons, and the further sum of two hundred and ninety-seven thousand four hundred and fifty-four dollars and fifty cents interest which had then accrued on said coupons, and the further sum of ten thousand five hundred and thirty-five dollars for interest which had then accrued on registered bonds, amounting in the aggregate to three million four hundred and twenty-two thousand seven hundred and seventy-
125 nine dollars and fifty cents, payable in gold coin, as aforesaid.

That the said trust deed, and the said indebtedness secured thereby, constitute a first lien upon all and singular that part of the railroad of the said Chesapeake and Ohio Railroad Company, extending from the depot in the city of Richmond, to the point on the James river now constituting the terminus of the said road on that river, together with all rights of way and franchises for the extension of the said line of road down the peninsula between the James and York rivers, to such point or points on said rivers or on the Chesapeake Bay as may hereafter be selected, and to which the line of said railroad may hereafter be constructed, including the tunnel and all wharves, rights of way, warehouses and lands of the said

company appurtenant to that part of the road of the said company extending from the said depot in Richmond to the terminus on the James river as aforesaid, and all other property and franchises of every kind and description appurtenant to this part of the line of the railroad of said company, and to the franchises for the extension thereof, and all other parts of the entire line of road of the said company, and all rights, franchises and privileges to said company belonging not embraced in the trust deed in the preceding ninth paragraph mentioned. And the said trust deed, and the indebtedness secured thereby, constitute a lien on all and singular the other property of every kind and description embraced and described in the said deed of trust next in order of priority to the lien in the last preceding (ninth) paragraph mentioned.

XI. That the following judgments constitute liens upon the real estate of the said defendant The Chesapeake and Ohio Railroad Company, in the order in which the same are hereinafter stated, subject, however, to the several liens hereinbefore specified, that is to say:

First. A judgment recovered by the National Valley Bank of Staunton, at the March term, 1874, of the circuit court of the
126 county of Augusta, in the State of Virginia, for the sum of sixty-three dollars and nineteen cents, with interest thereon from first May, 1872, until paid, and seven dollars and six cents costs.

Second. A judgment recovered by E. N. Kinchelor, on the —— June, 1874, in the circuit court of Augusta county, in the State of Virginia, for the sum of fifty-six dollars and twenty-five cents, with interest from first June, 1875, and eighty-three cents costs.

Third. A judgment recovered by H. M. Schmuck, on the seventh October, 1874, in the circuit court of the United States for the eastern district of Virginia, for the sum of three thousand and twenty-three dollars and eighty-three cents, with interest on twenty-eight hundred and ninety-seven dollars and sixteen cents from eleventh May, 1874, and thirty-four dollars and twenty cents costs.

Fourth. A judgment recovered by T. F. Watkins, on the fifth September, 1874, in the circuit court of Fayette county, in the State of West Virginia, for the sum of two thousand and thirty dollars and fifty-five cents, with interest from said fifth September, 1874, and twenty-one dollars and seventy cents costs.

Fifth. A judgment recovered by Clark & MacDonald, on the —— October, 1874, in the circuit court of Augusta county, Virginia, for the sum of seventeen hundred and forty dollars and thirty-four cents, with interest from tenth November, 1873, and eleven dollars and ninety-eight cents costs.

Sixth. A judgment recovered by W. L. Fleming, on the twentieth of November, 1874, in the circuit court of the city of Richmond, Virginia, for the sum of twenty-two hundred and fifty-seven dollars and thirty-one cents, with interest on thirteen hundred and eighty-one dollars and ten cents, part thereof, from tenth October, 1873, and on four hundred and forty-seven dollars and seventy-eight cents, another part thereof, from ninth October, 1873, and on four

hundred and twenty-eight dollars and forty-three cents, residue thereof, from third November, 1873, and ten dollars and seventeen cents costs. And also—

127 A judgment recovered by Samuel McCubbin, on said twentieth November, 1874, in said circuit court of the city of Richmond, Virginia, for the sum of seven hundred and six dollars and fifty-nine cents, with interest from tenth September, 1873, and eight dollars and sixty-seven cents costs. And also—

A judgment recovered by M. J. Wadsworth, on the eleventh December, 1874, in said circuit court of the city of Richmond, Virginia, for the sum of twelve thousand and four dollars and twenty cents, with interest from fourteenth February, 1873, and twenty-three dollars and eighty-four cents costs.

Seventh. A judgment recovered by Ro. T. Patton, on —— November, 1874, in the circuit court of Kanawha county, West Virginia, for the sum of twenty-five cents, and forty-six dollars and forty-nine cents costs. And also—

A judgment recovered by Patrick McAvery on, —— October, 1874, in the county court of the county of Kanawha, West Virginia, for the sum of twenty dollars and sixty-eight cents, with interest from twenty-third October, 1874, and fourteen dollars and forty-five cents costs.

Eighth. A judgment recovered by Carter Cook, assignee of Hall & Cook, on the first February, 1875, in the county court of Cabell county, West Virginia, for the sum of thirteen hundred and sixty-five dollars and twenty-two cents, with interest from said first February, 1875, and twenty dollars and five cents costs.

Ninth. A judgment recovered by the Baltimore Bridge Company on seventeenth February, 1875, in the circuit court of the city of Richmond, Virginia, for the sum of ten thousand dollars, with interest from twenty-second September, 1873, and seventeen dollars and thirty-six cents costs. And also—

A judgment recovered by the State Bank of Virginia, on said seventeenth February, 1875, in said circuit court of Richmond, Virginia, for the sum of five thousand and twenty-nine dollars and forty-nine cents, with interest from sixth October, 1873, on twenty-seven

128 hundred and eighty-four dollars and forty cents, part thereof, and from fifth November, 1873, on twenty-two hundred and forty-five dollars and nine cents, residue thereof, and ten dollars and fifty-seven cents costs. And also—

Another judgment recovered by said State Bank of Virginia, on said seventeenth February, 1875, in said circuit court of the city of Richmond, Virginia, for the sum of seven hundred and sixty-three dollars and seventy cents, with interest from fourteenth October, 1873, and eight dollars and forty-two cents costs.

Tenth. A judgment recovered by W. E. Wood & Company —— March, 1875, in the circuit court of Augusta county, Virginia, for the sum of seven hundred and seventy-two dollars and thirty-nine cents, with interest from sixth November, 1873, and nine dollars and seventy-eight cents costs.

Eleventh. A judgment recovered by William Tyree, on ——

March, 1875, in the circuit court of Fayette county, West Virginia, for the sum of three hundred and fifty-eight dollars and seventy-six cents, with interest and costs amounting to the sum of twenty-six dollars and ninety-nine cents.

Twelfth. A judgment recovered by J. L. Myers, on twenty-sixth April, 1875, in the circuit court of Alleghany county, Virginia, for the sum of twenty-four dollars, with interest from first November, 1873, and seven dollars and sixty cents costs. And also—

A judgment recovered by E. Smith, for D. Y. Huddleston & Company, on said twenty-sixth April, 1875, in said circuit court of Alleghany county, Virginia, for the sum of thirty-nine dollars, with interest from first September, 1873, and seven dollars and fifty-five cents costs. And also—

A judgment recovered by Moses Johnson and wife, on said twenty-sixth April, 1875, in said circuit court of Alleghany county, Virginia, for the sum of seventy-five dollars, with interest from twenty-sixth April, 1875, and seven dollars and seventy-five cents costs.

Thirteenth. A judgment recovered by the Kanawha Valley Bank, on the twenty-fourth May, 1875, in the circuit court of the
129 city of Richmond, Virginia, for the sum of six hundred and twenty-nine dollars and fifty cents, with interest from twelfth February, 1875, and nine dollars and six cents costs. And also.—

A judgment recovered by Morris Phillips and Company, on said twenty-fourth May, 1875, in said circuit court of the city of Richmond, Virginia, for the sum of eleven hundred and eighty-eight dollars and fifty-eight cents, with interest on six hundred and thirty-one dollars and eighty-three cents, part thereof, from seventeenth February, 1875, and on five hundred and fifty-six dollars and seventy-five cents residue thereof, from twentieth February, 1875, and nine dollars and fifty-six cents costs. And also—

A judgment recovered by Joseph P. Winston, on twenty-fourth June, 1875, in said circuit court of the city of Richmond, Virginia, for the sum of thirty-one hundred and seventy-three dollars and forty-six cents, with interest from eighteenth November, 1873, and eleven dollars and forty-nine cents costs. And also—

A judgment recovered by Joseph H. Crenshaw, on nineteenth July, 1875, in said circuit court of the city of Richmond, Virginia, for the sum of sixty-five hundred and forty dollars, with interest on twenty-two hundred and twenty-five dollars, part thereof, from fourth August, 1874, and on twenty-one hundred and eighty dollars, another part thereof, from fourth November, 1874, and on twenty-one hundred and thirty-five dollars, residue thereof, from fourth February, 1875, subject to a credit of sixteen hundred and twenty-seven dollars and eighty-seven cents, as of twenty-seventh March, 1875, and eleven dollars and ninety-six cents costs.

Fourteenth. A judgment recovered by A. W. Handley, on —— June, 1875, in the county court of Putnam county, West Virginia, for the sum of one hundred and twenty-nine dollars and twenty-one cents, with interest from eighteenth September, 1873, and —— costs.

Fifteenth. A judgment recovered by A. S. Lee, for the benefit of

Gertrude Mahood, on —— April, 1875, in the county court of Kanawha county, West Virginia, for the sum of six hundred and
130 twelve dollars and nineteen cents, with interest from third May, 1875, and twenty dollars and eighty-five cents costs.

Sixteenth. A judgment recovered by Bibb & Tabler, on the first July, 1875, in the circuit court of Cabell county, West Virginia, for the sum of nine hundred and sixty-six dollars and two cents, with interest from said first July, 1875, and thirty-five dollars and ninety-nine cents costs. And also—

A judgment recovered by Thomas Medford, on the second July, 1875, in said circuit court of Cabell county, West Virginia, for the sum of two hundred and sixty-three dollars and fifty cents, with interest from said second July, 1875, and fourteen dollars and fifty cents costs. And also—

A judgment recovered by John G. Uncel, on said second July, 1875, in said circuit court of Cabell county, West Virginia, for the sum of six hundred and fifty dollars, with interest from said second July, 1875, and twenty-eight dollars and twenty-five cents costs.

Seventeenth. A judgment recovered by the Citizens' Bank, of Norfolk, on the third November, 1875, in the circuit court of the city of Richmond, Virginia, for the sum of ten thousand and two dollars, with interest from twenty-first November, 1873, and sixteen dollars and eighty-six cents costs.

Eighteenth. A judgment recovered by Eli Ballinger, on the eighteenth November, 1875, in the county court of Summers county, West Virginia, for the sum of forty dollars, with interest, and thirty-two dollars and eighty cents costs. Also—

A judgment recovered by John A. Richmond, on nineteenth November, 1875, in said court, for the sum of thirty-five dollars, with interest, and seventy-seven dollars and thirty-five cents costs. Also—

A judgment recovered by George Fox, on said nineteenth day of November, 1875, in said court, for twenty-five dollars, with interest, and thirty-six dollars and sixty cents costs. Also—

A judgment recovered by R. F. Davis, on said nineteenth
131 November, 1875, in said court, for the sum of sixteen dollars and sixty cents, with interest from second May, 1874, and ten dollars and sixty cents costs. And also—

A judgment recovered by B. P. Gooch, on said nineteenth November, 1875, in said court, for the sum of thirty-five dollars, with interest, and twenty-nine dollars and thirty cents costs.

Nineteenth. A judgment recovered by Abraham Sims, who sues for George Sims, on —— November, 1875, in the circuit court of Augusta county, Virginia, for the sum of one hundred and twenty-five dollars, with interest from tenth November, 1875, and ten dollars and twenty-nine cents costs. And also—

A judgment recovered by Henry Coleman and P. Marshall, on said —— day of November, 1875, in said court, for the sum of one hundred and fifteen dollars, with interest from twenty-ninth May, 1875, and nine dollars and fifty-one cents costs. And also—

A judgment recovered by S. M. Davidson, on said —— November,

1875, in said court, for the sum of seven hundred and twenty dollars, with interest from eleventh November, 1875, and ten dollars and thirteen cents costs.

Twentieth. A judgment recovered by John Price, on the —— December, 1875, in the county court of Kanawha county, West Virginia, for the sum of forty-three dollars and seventy-five cents, with interest from seventh January, 1876, and forty-three dollars and fifteen cents costs. And also—

Twenty-first. A judgment recovered by John H. Bibb, on the —— February, 1876, in the circuit court of Albemarle county, Virginia, for the sum of one hundred and eleven dollars and fifty-three cents, with interest from twentieth October, 1875, and eight dollars and ninety-six cents costs.

Twenty-second. A judgment recovered by John W. Smith, on the twenty-sixth April, 1876, in the circuit court of Bath county, Virginia, for the sum of sixty dollars, with interest thereon from said twenty-six April, 1876, and —— costs.

Twenty-third. A judgment recovered by John J. Estes, on the
132 sixteenth June, 1876, in the county court of Putnam county, West Virginia, for the sum of forty dollars, with interest, and forty-seven dollars and thirty-six cents costs. Also—

A judgment recovered by M. S. Kirtley, on said sixteenth June, 1876, said court, for the sum of one hundred and thirty-nine dollars and thirty-six cents costs. Also—

A judgment recovered by Alexander Thacker, on seventeenth June, 1876, in said court, for the sum of forty dollars, with interest, and twenty-six dollars and sixteen cents costs. And also—

A judgment recoverd by John Adkins, on said seventeenth June, 1866, in said court, for the sum of thirty dollars, with interest, and twenty-four dollars and eighty-six cents costs.

That there is now due and unpaid, in respect of certain claims specified in the said commissioner's report, which the said receiver has heretofore, by an interlocutory order in this cause, been directed to pay and discharge the sum of three thousand five hundred and forty-nine dollars and thirty-one cents ($3,549.31).

That in addition to the indebtedness secured by the said mortgage to Duncan, Calhoun, Orton, and Maury, in the preceding eighth paragraph mentioned, there is due and secured by the said mortgage the sum of three thousand seven hundred and fifty dollars, with interest thereon from the first day of August, 1870, to be paid to the personal representatives of the said Maury, one of the trustees under the said trust deed, in pursuance of a decreee heretofore rendered in favor of the said Maury, together with the costs thereon, amounting to four hundred and thirty-three dollars and sixty cents, as set forth in the said commissioner's report and accompanying account. All the indebtedness in this twelfth paragraph mentioned must be paid and satisfied before a conveyance to the purchaser under the sale hereinafter directed. That there is also now pending in the chan-
cery court of the city of Richmond a suit instituted before
133 the proceedings in this cause were commenced wherein Mary J. Wadsworth is asserting a lien under her judgment herein-

before referred to, upon certain real estate of the defendant company in said bill mentioned. That there is also pending in the circuit court of the city of Richmond a suit instituted before the proceedings in this cause were commenced, wherein Clark & MacDonald are asserting a lien under their judgment hereinbefore referred to, upon certain real estate of the said defendant company in said bill mentioned. That there was recently pending in said last mentioned court a suit, instituted before the proceedings in this cause were commenced, wherein G. T. Boston & Co. assert a claim for a balance of $5,579.17, exclusive of interest, for which amount they claim to be entitled, under the laws of the State of Virginia, to a mechanic's lien upon certain real estate of the said defendant company in the bill mentioned. On the 19th day of April, 1877, said court heard and determined adversely to said Boston & Co., from which decision the said Boston & Co. have announced their purpose to appeal. All of these several claims are resisted. If the said claims shall be established as liens superior to the liens of the mortgage executed by the defendant company to the extent that they may be so established, they must be paid and satisfied before a conveyance to the purchaser under the sale hereinafter di*i*rected or reserved as a lien upon the premises conveyed.

XIII. That there are certain unsettled and unadjusted claims for taxes made by the State of West Virginia against the defendant, the Chesapeake and Ohio Railroad Company, all of which claims are in dispute, and some of which are the subject of pending litigation, as more fully set forth in the said commissioner's report. If it shall hereafter be found that the defendant company is liable for the taxes so claimed, or any part thereof, such taxes will constitute a lien upon the property of the said company embraced in the trust deeds hereinbefore mentioned; but the amount and nature of such lien, if any, cannot at present be ascertained or defined, and to the extent, if any, that this lien may hereafter be found to exist,
134 it will rank in priority before any of the liens upon the same premises hereinbefore specified.

There is, as appears by the master's report, a sum of eight thousand one hundred and thirty-eight dollars in controversy, the same being made up by deductions from coupons of different classes of bonds, to meet a claim of the State of Virginia for taxes on such coupons, the validity of which tax is disputed. The premises must be sold subject to such lien for this sum as may be hereafter found and established, and interest that may accrue thereon.

XIV. That the line of railroad of the Chesapeake and Ohio Railroad Company, so extending from a point on the James river to a point on the Ohio river, in Cabell county, in the State of West Virginia, as more fully described in the bill of complaint in this suit, and in the commissioner's report, is so located and situated, and every part thereof is so dependent in relation to every other part, including all and singular the rights, privileges, and franchises of the said company embraced in the several deeds of trust hereinbefore mentioned, that no part thereof separately can be used profitably or advantageously, and that no part thereof can be sold sep-

arately to advantage; but, on the contrary, a sale thereof in parcels would be much less productive than a sale of the whole line, and of all such franchises, etc., as an entirety, and would for that reason be prejudicial to the interests of the several creditors and classes of creditors entitled to share in the proceeds of sale in the order of priority hereinbefore established.

That so much of the property of the said Chesapeake and Ohio Railroad Co. as is included in the part of the said line of road, with its appurtenances, and all rights and franchises appertaining thereto, extending from the depot of the company in Richmond to the present terminus on the James river, and in the various other premises, rights, and franchises embraced in the trust deed, in the tenth paragraph mentioned, and not embraced in any of the liens prior thereto, as more fully set forth in the commissioner's report, does, as in said report is found and stated in respect of value, stand in relation to the whole line of rail-
135 road and property of the said company in the ratio and proportion of ten to ninety, after the payment and satisfaction of all liens upon the premises, and every part thereof, prior to the liens of the two mortgages in paragraphs nine and ten mentioned; and that on a sale of the mortgaged premises as an entirety, one-tenth part of the remaining proceeds of sale, after satisfying the liens prior to those in the said ninth and tenth paragraphs mentioned, should be taken and assumed to be the proceeds of sale of that part of the said line, and its aforesaid appurtenances, extending from the said depot to the said point on the James river, and of all and singular the other property, rights, privileges, and franchises embraced in the trust deed in the said tenth paragraph mentioned, and not embraced in the trust deeds in the said ninth and preceding paragraphs mentioned; and that nine-tenths of such remaining proceeds of sale should be taken to be the proceeds of the sale of all and singular the other part of the said line and premises in question.

It is therefore ordered, adjudged, and decreed that in the distribution of the proceeds of the sale hereinafter directed to be made of all and singular the premises in question as an entirety, the ratio and proportion here declared and established be observed in the distribution of any proceeds of sale that may remain for distribution among creditors entitled to share in the proceeds of sale in respect of the liens found and established in the ninth and tenth paragraphs of this decree, after satisfying prior liens in the order established by this decree.

XV. It is further ordered, adjudged, and decreed that the several persons and corporations having liens upon the premises, or some part thereof, as hereinbefore found, stated and established, are severally and respectively entitled to enforce their said liens by a sale according to the usual course and practice of the court; and the said defendant, the Chesapeake and Ohio Railroad Company, has filed in this cause an express waiver in writing of a day for payment, and has therein and thereby consented to the sale of the entire

136 line of the road and mortgaged premises as an entirety at such time as this court may deem proper to direct.

XVI. It is further ordered, adjudged, and decreed that at any time prior to the sale of the premises hereinafter directed to be made, any person, persons, or corporation in whose favor a lien on the premises, or any part thereof, is established by this decree, their successors or assigns, may redeem any lien or liens prior to his or their lien; and in case of such redemption, the person, persons, or corporation so redeeming shall be subrogated to all and singular the rights of the person, persons, or corporation under this decree whose lien has been so redeemed, and shall stand in the place of such person or corporation in the distribution of the proceeds of sale.

XVII. And whereas, the premises considered, it appears to and is found by this court that the premises cannot be otherwise sold to advantage, and without prejudice to the interest of the several liens and the beneficiaries thereunder, it is further ordered, adjudged, and decreed that all and singular the premises embraced in the mortgage to the board of public works in the fifth paragraph of this decree mentioned, including the rights, privileges, and franchises embraced in the said mortgage; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the said trust deed to H. W. Fry, William H. MacFarland, and James Lyons in the sixth paragraph of this decree mentioned; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the said trust deed to John B. Young and Robert R. Howison in the seventh paragraph of this decree mentioned; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the said trust deed to Philo C. Calhoun, William Butler Duncan, William Orton, and Matthew F. Maury in the eighth paragraph of this decree mentioned; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the trust deed to Philo C. Calhoun and William Butler Duncan in the ninth paragraph of this decree mentioned; and all and singular the premises, rights, privileges, and franchises included and con-

137 veyed in and by the said trust deed to the said Philo C. Calhoun and William K. Kitchen, trustees, in the tenth paragraph of this decree mentioned, be sold as an entirety, free and discharged of and from the liens and incumbrances of the said several mortgages and deeds of trust, and of and from each and every one of the said deeds of trust or mortgages in this paragraph mentioned, and free and discharged of and from all and singular the liens of every kind and description hereinbefore found and recited, except the liens for taxes hereinbefore referred to, if any such liens shall be hereafter established, and the lien for certificates of indebtedness that have been or may hereafter be issued by the receiver for the payment of the arrears of taxes due to the State of Virginia as authorized by a decree of the circuit court of the city of Richmond and a decree of this court heretofore entered; and that when the sale herein ordered shall have been made and approved by this

court, all equities of redemption of the various lien-holders, in the order of their subordination, and of the defendant company, the Chesapeake and Ohio Railroad Company, shall be forever determined and barred.

XVIII. It is further ordered, adjudged, and decreed that Williams C. Wickham, the receiver in this cause, be, and he is hereby, appointed a commissioner to make the sale provided for and directed in the last preceding paragraph in conformity to the directions herein contained, and before entering upon the performance of his duties he shall execute and file with the clerk of this court a bond in the penal sum of two hundred and twenty-five thousand dollars, with surety or sureties to be approved by this court or the clerk thereof in vacation, conditioned for the faithful performance of his duties in the premises. Such sale shall be made by the said commissioner, at Richmond, in the State of Virginia, and he shall give notice of the time, place, and terms of such sale, by an advertisement thereof, to be inserted once in each week, for not less than ninety days before such sale, in at least one newspaper pub-
138 lished in each of the cities of Richmond, Virginia; Charlestown, West Virginia; in the cities of Baltimore, Maryland; Washington, D. C., and in the city of New York.

And the said commissioner shall also serve notice of such sale—the time, place, and terms thereof—upon the board of public works of the State of Virginia at least ninety days before the day fixed for such sale.

XIX. It is further ordered, adjudged, and decreed that the terms upon which the said commissioner shall expose the premises for sale are and shall be as follows, that is to say:

The purchaser shall pay on the day of sale, or within such short time thereafter as the commissioner may designate, not exceeding ninety days, the sum of two hundred thousand dollars in cash.

The cash so to be paid shall be applicable to the payment of the interest due and accrued at the date of its payment on the obligations of the said Virginia Central Railroad Company, and to such other purposes as the same may be properly applied under the orders of the court; and any sums so paid in the meantime by the receiver, and any sums which, at the expiration of the said ninety days, he may have in hand after paying the expenses of operating the road, shall be deducted from the amount so required to be paid in cash.

For so much of the purchase-money as shall be equal to the balance of the said interest due and accrued on the said obligations of the Virginia Central Railroad Company at the date of the trust deed hereinafter directed to be made for the security thereof, and then unpaid and unprovided for, the commissioner shall allow a credit of three years, in equal annual installments, with interest at the rate of six per centum per annum.

For the sum of $487,578.90, representing the principal sum due under the trust deed to John B. Young and Robert R. Howison, in the seventh paragraph of this decree mentioned, and the principal of the several sums found and stated to be due in the 8th paragraph

of this decree, and for any additional sum which may be due on account of any of the claims in said eighth paragraph men-
139 tioned, the commissioner shall allow a credit of five years from the date of sale, with interest at the rate of eight per cent. per annum, payable semi-annually, upon the sum of $460,500, the part thereof which represents the principal of the eight per cent. bonds of the Va. Central Railroad Company, and with interest upon the residue of said principal sums at the rate of six (6) per cent. per annum, payable semi-annually.

For the further sum of $1,018,000, representing the amounts found and stated in the sixth paragraph of this decree to be the principal outstanding under the mortgage to the said H. W. Fry, W. H. MacFarland, and James Lyons, and under the mortgage to the board of public works in the fifth paragraph hereof mentioned, the commissioner shall allow a credit from the date of sale until the first day of July, 1887, with interest at the rate of six per centum per annum, payable semi-annually.

The payment of the said several sums, in respect of which credit is to be allowed, as in this paragraph before stated, and the interest thereon, and the bonds hereinafter provided for, shall be secured under and by a trust deed of all and singular the premises sold under this decree, and constituting a first lien thereon, to be executed and delivered to a trustee to be appointed by the court simultaneously with the delivery of the conveyance of the premises to the purchaser, which trust deed shall by its terms maintain and preserve all existing priorities of lien as between the different classes of bonds of the said Virginia Central Railroad Company, as in this decree found and stated. Appropriate and convenient obligations, representing the said several sums in respect of which credit is so to be given as aforesaid, shall be created, issued and delivered to the several creditors entitled to receive the same; and in case of any disagreement as to the form and tenor thereof, the same shall be settled and prescribed by the court on application.

In order to enable the purchaser or purchasers, his or their representatives or assigns, if he or they shall so elect, to an-
140 ticipate the payment of the said several sums in respect of which credit is to be allowed, as herein provided, or any part thereof, and to provide for the reimbursement of sums paid in respect of the indebtedness of the Virginia Central Railroad Company, the several specific liens herein found, and the expenses of this cause, he or they may create and issue from time to time under the said deed of trust, and to be secured by the lien thereof, as hereinafter provided, his or their bonds to such an amount, not exceeding in the aggregate the aggregate amount of the existing indebtedness of the Virginia Central Railroad Company herein found and stated, the amount of such specific liens and expenses, with interest accrued and to accrue thereon, and the amount which has been ascertained to be due to and decreed in favor of the State of Virginia for arrears of taxes, and of such denominations and tenor as he or they may determine.

The said bonds shall stand secured by and under the lien of the

said deed of trust when and to the extent that the same shall be endorsed with the certificate of the said trustee or trustees to that effect; and the said trustee or trustees shall, when requested, so endorse and deliver the same to the extent and amount that the said indebtedness of the Virginia Central Railroad Company, and such other indebtedness for which bonds may be created, shall have been previously paid off and satisfied, or upon the receipt by him or them of the par value of the bonds so endorsed and delivered, with accrued interest to the time of the delivery, in cash, or upon the surrender to him or them of an equivalent amount in said obligations herein required to be given to the several creditors of the Virginia Central Railroad Company for that part of the purchase-money for which credit is to be allowed, and so as aforesaid to be secured under the said trust deed or the other indebtedness.

The proceeds of the said bonds so paid into the hands of the said trustee or trustees in cash shall be applied by him or them as soon as practicable thereafter to the purchase or redemption of the
141 said obligations secured by the said deed of trust at a price not exceeding par and accrued interest, and the said obligations when so surrendered to or redeemed by him or them shall be cancelled.

When all of the said purchase-money secured by the said deed of trust, in respect of which credit is given as aforesaid, shall have been paid, and the obligations representing the same extinguished, and the expenses of the trust shall have been paid, all of such bonds then remaining in the hands of the trustee or trustees shall be surrendered, and any balance of the proceeds of bonds remaining in his or their hands shall be paid over.

The net revenues and earnings of the property accruing between the date of such sale and the conveyance of possessson to the purchaser or purchasers, his or their representatives or assigns, not otherwise disposed of in pursuance of the orders of the court made or that may hereafter be made, shall be appropriated and applied, under the direction of the court, by the receiver for the benefit of the purchaser or purchasers, his or their representatives or assigns, and, in the first place, towards the payment and discharge of that part of the purchase-money above mentioned applicable to the payment and satisfaction of the past due interest on bonds of the Virginia Central Railroad Company, secured by the deeds of trust in the fifth, sixth, seventh, and eighth paragraphs mentioned, or towards the payment of any installments of interest that may become due and payable between the date of sale and the transfer and conveyance of the property to the purchaser, in such order as the court may direct.

In case the premises herein directed to be sold shall not sell for a sum sufficient to pay and satisfy all the liens thereon, as herein found and established, but shall sell for a sum that will leave a balance after the payment of the liens prior to those in the ninth and tenth paragraphs mentioned, for such balance of purchase-money as may be applicable to the payment of overdue interest on the bonds secured by the trust deeds in the said paragraphs respectively

mentioned, in the ratio and proportion by this decree estab-
142 lished, the purchaser shall be entitled to a credit of twelve years from the date of sale; *provided*, however, that the said commissioner shall receive from such purchaser or purchasers, his or their representatives or assigns, interest coupons of the bonds in the said ninth and tenth paragraphs mentioned in payment, at such rate per centum of the par value of the said coupons as will be payable to the holder of such coupons upon the distribution of the proceeds of sale under the priorities of lien, as by this decree settled and determined.

For that portion of the purchase-money, if any, applicable to the payment of the principal of bonds outstanding and secured by the said last-mentioned deeds of trust, respectively, in the ratio and proportion herein and hereby established, the purchaser or purchasers, his or their representatives or assigns, shall be entitled to a credit for such part thereof as will be due and payable in respect of each class of bonds for a period of time corresponding to the time which each class respectively has yet to run before the maturity thereof.

In case nine-tenths of such part of the purchase-money should amount to a sum more than sufficient to pay the amount of the bonds outstanding under the trust deed in the said ninth paragraph mentioned, the surplus shall be applicable to the payment of the balance of principal due in respect of bonds secured under the trust deed in the said tenth paragraph mentioned.

That portion of the purchase-money, if any, applicable to the payment of the interest due at the date of sale, and of the principal under the said two last-mentioned trust deeds, in respect of which credit is given, or so much thereof as may remain outstanding and unprovided for at the date of the conveyance to the purchaser, must be secured by a trust deed or mortgage ranking next in priority after the liens to be created in pursuance of this decree for the security of the deferred payments hereinbefore provided for, which mortgage or deed of trust must be for the common security of bond-
holders under the trust deeds in the ninth and tenth para-
143 graphs of this decree, in the ratio and proportion hereinbefore established; and interest on the sum for which credit is allowed as aforesaid must be paid semi-annually, at the rate of six per cent. per annum, at such time as the court shall direct, the said mortgage or trust deed to be approved by the court.

If the premises should sell for a sum more than sufficient to pay and satisfy all the liens herein found and established prior to the judgment liens, the surplus must be paid by the purchaser in cash, to be disposed of, under the orders of this court, according to law.

If the sale shall be approved by the court upon the commissioner's report thereof coming in, the same shall stand confirmed whenever and so soon as all of the terms of sale as specified in this decree shall have been complied with, and all acts shall have been done by this decree required to be done in order to entitle the purchaser or purchasers, his or their representatives or assigns, to a conveyance of the premises. And upon such compliance and performance as aforesaid, and

upon application and due proof thereof, and upon the assumption by the said purchaser or purchasers, his or their representatives or assigns, of all then outstanding lawful contracts and liabilities of the receiver, as well those made, entered into, and incurred in his own name as also those made, entered into, and incurred by him in the name of the Chesapeake and Ohio Railroad Company, and upon indemnifying him against the same to the satisfaction of this court, the court will order a conveyance of title to and transfer of possession of all and singular the premises to the purchaser or purchasers, or his or their representatives or assigns, upon the execution by such purchaser or purchasers, his or their representatives or assigns, contemporaneously with such conveyance, and to the satisfaction of this court, of a mortgage or mortgages, or trust deed or deeds of all and singular the premises so sold and purchased for the security of all deferred payments and the interest thereafter to accrue thereon as required by this decree.

144 The purchaser shall be at liberty to anticipate the payment of any or all sums required by this decree to be paid.

The said commissioner shall deposit all moneys coming into his hands under this decree, as soon as may be after the receipt thereof, in the First National Bank of Richmond, Virginia, to the credit of this cause, and file with the papers a certificate thereof.

Inasmuch as the nature and extent of the lien upon the premises for taxes due to the State of West Virginia, if any there be, cannot now be ascertained, such sale must be made subject to any such liens now existing for taxes; but it will be the duty of the commissioner to give the purchaser the fullest and most reliable information concerning such taxes and lien that he may be able to acquire in the meantime.

The fees of the said commissioner for making such sale and the performance of the duties imposed by this decree shall be ——.

XX. It is further ordered, adjudged, and decreed that the purchaser or purchasers at such sale, or his or their representatives or assigns, may pay any part of the purchase-money not required to be paid in cash in any of the outstanding bonds or interest coupons, secured by the several mortgages or deeds of trust in this decree mentioned, at such rate per centum of the par value of said bonds and coupons, with the interest that may be due and payable thereon, as in the opinion of said commissioner will be payable in respect of such bonds or coupons, upon the distribution of the proceeds of such sale under the priorities of lien as settled and determined by this judgment and decree; and if any question shall arise as to the rate and amount at and for which such bonds and coupons shall be received, leave is given to apply to this court upon the foot of this decree. At such sale, as between bidders whose bids are otherwise of equal value, the commissioner shall receive the bid of the purchaser or purchasers who are ready and willing to pay the largest proportion of their bids in cash, or its equivalent, that is to

145 say, the bonds and coupons which he is authorized to receive, in addition to the amount of cash hereinbefore required to be paid by the purchaser.

XXI. And it appearing to the court that the circuit court of the city of Richmond, by decree entered in this suit hereinbefore mentioned, in which the complainants and defendants in this suit are respectively complainants and defendants, did direct the receiver to pay to James Lyons, surviving trustee in the mortgage or trust deed in the sixth paragraph of this decree found and established, the sum of five thousand dollars, in full compensation and payment for all services rendered and expenses incurred for counsel fees or otherwise by him as trustee in respect of the said trust and trust deed hereinbefore mentioned; and to pay to John B. Young, for fees as counsel in this cause, the sum of two thousand dollars; and to pay to John B. Young and Robert R. Howison, trustees in the mortgage or trust deed in the seventh paragraph of this decree found and established, the sum of five hundred dollars, in full compensation and payment for all services rendered and expenses incurred for counsel fees or otherwise by them as trustees in respect of the said trust or trust deed herein last above mentioned; and to pay to Page and Maury, attorneys for William Orton, trustee, the sum of five hundred dollars for fees as counsel; and it appearing from the supplemental report of the commissioner filed in this cause that said sums have been paid accordingly, and the court deeming such allowances ample and sufficient to the parties aforesaid, ratifies and approves the action of the said circuit court of the city of Richmond, and makes no further allowance [to] said parties, or any of them, and doth accordingly deny the prayer of the petition of James Lyons, which was heretofore filed in this cause.

And it is further ordered, adjudged, and decreed that all questions concerning the distribution of the cash required to be paid by the purchaser on such sale, and of such part of the purchase-money as may subsequently be paid in pursuance of this decree, prior to the conveyance and transfer of the property to the said purchaser
146 in the manner and upon the conditions hereinbefore provided, all questions as to the compensation, fees, and expenses of the several other trustees mentioned in this decree, and as to fees and allowance of and to counsel, solicitors, and attorneys, and all other questions that may arise concerning the premises not hereinbefore disposed of, be reserved for settlement, leave being hereby given to any party in interest to apply from time to time for that purpose.

XXII. After such sale the said commissioner is directed to report his acts and doings in the premises with all convenient speed to this court; and no sale under this decree shall be effective to pass any right, title, or interest in the premises until the same shall have been approved by this court, nor shall the purchaser be entitled to possession of the premises until the provisions of this decree and all its requirements shall have been complied with, all fees, costs, and expenses shall have been paid, together with all sums found and stated herein to be due, or that may be ascertained to be due, and in respect of which credit is not allowed, and the court shall have ordered the receiver to surrender such possession to the purchaser.

In case of any failure on the part of the purchaser or purchasers,

or his or their representatives or assigns, at any time, to comply with any of the terms of sale, the commissioner is directed to apply to this court for further directions in the premises, and any party interested may also apply if so advised. And no sale of the premises shall be approved and finally confirmed by this court until or unless the same shall also be approved and finally confirmed by the circuit court of the city of Richmond.

A copy. Teste: W. E. G. GILLISON,
Clk Kanawha Circuit Ct., W. Va.

147 EXHIBIT F.

At a Circuit Court continued and held for Kanawha County, at the Court-House thereof, on Friday, May 24th, A. D. 1878.

DUNCAN and CALHOUN, Trustees,
vs.
THE CHESAPEAKE & OHIO R. R. CO. & *als.* } In Chancery.

This cause came on this day to be further heard on the papers formerly read, the proceedings and orders formerly had and entered herein, and the report of W. C. Wickham, special commissioner, showing that on the 2d day of April, 1878, the said commissioner sold to A. S. Hatch, C. P. Huntington, A. A. Lowe, Isaac Davenport, Junior, and John Castree, committee of purchase and reorganization, for themselves and others, the entire premises and property, rights, privileges, and franchises of the Chesapeake & Ohio Railroad Company, in due conformity with and as required by decrees heretofore entered herein, and decrees in substances of like tenor and effect as said decrees entered in the circuit court of the city of Richmond, in the State of Virginia, in a suit between the same parties for a similar purpose as this suit and pending in said court, which said report was duly filed in the clerk's office of this court on the 20th day of April, 1878, and to which report no exception has been taken or filed, and was argued by counsel. On consideration whereof, the court doth adjudge, order, and decree that said report be, and the same is hereby, approved and confirmed, and the court doth ratify and approve the sale made by said commissioner on the 2d day of April, 1878, to A. S. Hatch, C. P. Huntington, A. A. Lowe, Isaac Davenport, Jr., and John Castree, committee of purchase and reorganization, for themselves and others, upon the terms and conditions of sale set forth in the said report of said special commissioner, and doth further adjudge, order, and decree that said sale so reported, and as hereby approved, shall stand confirmed whenever and so soon as all of said terms and conditions of sale as specified in the
148 decree of sale entered in this cause on the 18th day of December, 1877, as the same has been modified by the decree entered herein on the 17th day of May, 1878, and as specified in said report of special commissioner, W. C. Wickham, shall have been complied with, and all acts shall have been done by the decrees aforesaid required to be done in order to entitle said purchasers, their representatives or assigns, to possession and to a conveyance of the

premises. But this decree is not to take effect and become operative until and unless a similar decree of approval and confirmation of said sale shall be entered in the case pending in the circuit court of the city of Richmond, in the State of Virginia, and heretofore referred to, but the same shall take effect and become definitive upon the filing with the clerk of this court a certified copy of said order and decree, as aforesaid, of the said circuit court of the city of Richmond, in the State of Virginia.

Copy. Teste: THOMAS SWINBURN, *Clerk.*

EXHIBIT G.

VIRGINIA:

In the Circuit Court of the City of Richmond, Monday, May 20th, 1878.

WILLIAM BUTLER DUNCAN and PHILO C. CALHOUN, Trustees, Plaintiffs,

against

THE CHESAPEAKE AND OHIO RAILROAD COMPANY and Others, Defendants.

This cause came on this day to be further heard on the papers formerly had and entered herein, and the report of W. C. Wickham, special commissioner, showing that on the 2d day of April, 1878, the said commissioner sold to A. S. Hatch, C. P. Huntington, A. A. Lowe, Isaac Davenport, Jr., and John Castree, committee of purchase and reorganization, for themselves and others, the entire premises and property, rights and privileges and franchises of the Chesapeake and Ohio Railroad Company, in due conformity with and as required by decrees heretofore entered herein and
149 decrees in substance of like tenor and effect as said decrees entered in the circuit court of the county of Kanawha, in the State of West Virginia, in a suit between the same parties for a similar purpose as this suit, and pending in said court, which said report was duly filed in the clerk's office of this court on the 15th day of April, 1878, and to which report no exceptions has been taken or filed, and was argued by counsel. On consideration whereof the court doth adjudge, order, and decree that said report be, and the same is hereby, approved and confirmed, and the court doth ratify and approve the sale made by said commissioners on the 2d day of April, 1878, to A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Jr., and John Castree, committee of purchase and reorganization, for themselves and others, upon the terms and conditions of sale set forth in said report of said special commissioner, and doth further adjudge, order, and decree that said sale, as reported and as hereby approved, shall stand confirmed whenever and so soon as all of said terms and conditions of sale as specified in the decree of sale entered in this cause on the 26th day of March, 1877, as the same has been modified by decrees subsequently entered thereto and as specified in said report of special commissioner, W. C. Wickham, shall have been complied with, and all acts shall have been done by said decrees required to be done in order to entitle

said purchasers, their representatives or assigns, to possession and to a conveyance of the premises. But this decree is not to take effect and become operative until and unless a similar decree of approval and confirmation of said sale shall be *entitled* in the case pending in the circuit court for the county of Kanawha, in the State of West Virginia, and hereinbefore referred to, but the same shall take effect and become definitive upon the filing with the clerk of this court a certified copy of said order and decree as aforesaid of the said circuit court for the county of Kanawha, in the State of West Virginia.

A copy. Teste: ALFRED SHEILD, *Clerk.*

150 VIRGINIA:

In the Circuit Court of the City of Richmond, Wednesday, May 29th, 1878.

WILLIAM BUTLER DUNCAN and PHILO C. CALHOUN, Trustees, Plaintiffs,
against
CHESAPEAKE AND OHIO RAILROAD COMPANY and others, Defendants.

Upon motion of the complainants, by counsel, and a certified copy of the decree entered in the circuit court of the county of Kanawha, in the State of West Virginia, on the 24th day of May, 1878, in a suit between the same parties and for a similar purpose as this suit, and pending in said court, approving and confirming the sale made on the 2d day of April, 1878, to A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Jr., and John Castree, committee of purchase and reorganization, for themselves and others, being exhibited to the court, it is ordered that said certified copy of said decree be filed among the papers of this cause as a part of the record of this case, and that the decree entered by this court in this cause on the 20th day of May, 1878, confirming and approving said sale, provided the same be confirmed and approved by said circuit court of the county of Kanawha, be, and the same is hereby, reaffirmed, to take effect definitively from and after the entry of this decree.

A copy. Teste: ALFRED SHEILD, *Clk.*

EXHIBIT I.

STATE OF WEST VIRGINIA, *ss:*

At a Circuit Court held for Kanawha County, at the Court-House thereof, on the 1st day of July, 1878.

WILLIAM BUTLER DUNCAN and PHILO C. CALHOUN, Trustees, *vs.* THE CHESAPEAKE AND OHIO RAILROAD COMPANY and others. } In Chancery.

This cause came on this day to be again heard upon the papers formerly read, the proceedings and orders formerly had

and entered herein, and the report of W. C. Wickham,
151 special commissioner, this day filed, and the papers therein
referred to and therewith returned, supplementary to his report of sale hereinbefore filed, and was argued by counsel. And the court having considered the premises, it is hereby ordered, adjudged, and decreed that the action of the said special commissioner be, and the same is hereby, approved, and his said report is hereby confirmed; that the form of deed from the said special commissioner to the said purchasers, presented with the commissioner's report, be, and the same is hereby, approved, and the said special commissioner is hereby authorized and directed to execute and deliver to the said purchasers a deed of like form and tenor; that the form of trust deed to be executed by the corporation that will be created by the aforesaid conveyance, and which is declared in the deed of conveyance to be a corporation under the name of the Chesapeake and Ohio Railway Company, to a trustee or trustees to be appointed by this court in compliance with the said judgment and decree, and for the purposes therein mentioned, presented with the said report, be, and the same is hereby, approved.

It is further ordered, adjudged, and decreed that Joseph Bryan and Henry T. Wickham be, and they hereby are, in pursuance of the said judgment and decree, appointed trustees to receive the said trust deed, cause the same to be duly recorded, and to execute the trusts thereof; and to the end that the said trustees may apply to this court in this cause for such instructions, directions, and relief in regard to the execution of the said trust as may be needful, the plaintiffs are directed and required by a proper amendment to their bill of complaint, by way of supplement, to make the said trustees and the said Chesapeake and Ohio Railway Company parties defendant to this cause.

And whereas it appears that the payments which have heretofore been made on account of the specific liens, taxes, and expenses of this cause, including the sum of two hundred thousand dollars paid
in respect thereof, and of the said indebtedness of the Virginia
152 Central Railroad Company, to the commissioner in pursuance of the terms of sale, in respect of which the said purchaser or purchasers are entitled to issue their obligation under the said deed of trust, and to be secured thereby, amount in the aggregate to the sum of four hundred and thirty thousand one hundred and ninety dollars and 95c., it is further ordered, adjudged, and decreed that such obligations to the amount aforesaid may now or at any time hereafter be created and issued by the company under the said deed, and upon being duly certified by the said trustees and the said company be so issued, the same shall stand secured by the said deed as in the said deed provided, and it shall be the duty of the said trustees to so certify the said obligations to the amount aforesaid whenever requested by the said company so to do; and also to certify in like manner from time to time, upon application of the said company such other obligations as the said company may be or become entitled to issue under the said deed of trust in pursu-

ance of the several judgments and decrees hereinbefore entered in this cause as modified by this decree.

It is further ordered, adjudged, and decreed that this cause remain upon the docket of this court and stand continued, with leave to the said trustees to apply to this court from time to time for such instructions as may be needful touching the execution of the said trust, and for such relief as may be proper in the event of any default on the part of the said Chesapeake and Ohio Railway Company in complying with the provisions of the said trust deed, or in the event that such application may be needful for the preservation and protection of the trust property and estate, and the due application of the same to the uses and purposes specified in the said deed of trust, and for all the purposes herein specified, this court doth retain the said cause, its jurisdiction over the same over the parties thereto, and the premises and property embraced in the said trust deed. It is further ordered, adjudged, and decreed that upon the due execution and delivery of the conveyances above men-
153 tioned the receiver do, and he is hereby, directed to turn over, transfer, and deliver the premises, and every part thereof so sold and purchased as aforesaid, to the Chesapeake and Ohio Railway Company, together with any balance of the earnings and income thereof then in his hands, whether collected or uncollected.

It is further ordered, adjudged, and decreed that the 19th paragraph of the judgment and decree entered herein on the 18th day of December, 1877, be, and the same is hereby, amended by striking out of said paragraph the words "or upon the receipt by him or them of the par value of the bonds so endorsed and delivered, with accrued interest in cash;" and also by striking out the words "the proceeds of the said bonds so paid into the hands of the said trustee or trustees in cash, shall be applied by him or them, as soon as practicable thereafter, to the purchase or redemption of the said obligations secured by the said deed of trust, at a price not exceeding par and accrued interest, and the said obligations when so surrendered to or redeemed by him or them shall be cancelled;" and by adding after the word "indebtedness," in the next preceding clause, the words "and any of the said obligations so rendered to him or them shall be cancelled and delivered to the purchaser or purchasers, his or their representatives or assigns;" and also that the said paragraph be further amended by striking out the following words: "When all of the said purchase-money secured by the said deed of trust, in respect of which credit is given as aforesaid, shall have been paid and the obligations representing the same extinguished, and the expenses of the said trust shall have been paid, all of such bonds then remaining in the hands of the trustee or trustees shall be surrendered, and any balance of the proceeds of bonds remaining in his or their hands shall be paid over." The said trustees are hereby authorized and directed to report to this court when and, as obligations under this deed are issued and certified by them, the amount so issued and certified, and the amount and nature of the indebtedness in respect of which the same has been issued.

154 It is further ordered and decreed that inasmuch as the exact amount of the charges and expenses payable out of the cash proceeds of sale cannot be presently ascertained and settled, that one hundred and fifty thousand dollars thereof be, and the same is hereby, set apart for distribution to and among the several creditors whose debts are prior in point of lien to the mortgages in the 9th and 10th paragraphs of the said decree mentioned, and that fifty thousand dollars of such proceeds to be set apart for the payment of such charges and expenses, and that any balance remaining of such sum, if any, after the payment of such charges and expenses, be dealt with and distributed as the court on application may direct.

A copy. Teste: W. E. G. GILLISON, *Clk.*

STATE OF WEST VIRGINIA, *ss:*

I, Wm. E. G. Gillison, clerk of the circuit court for Kanawha county, in the State of West Virginia, do certify that the foregoing is a true copy from the records of my said court.

Given under my hand, this 15th day of August, 1879.

W. E. G. GILLISON, *Clk.*

EXHIBIT H.

STATE OF VIRGINIA:

At a Circuit Court held for the City of Richmond, on Saturday, the 29th day of June, 1878.

WILLIAM BUTLER DUNCAN and PHILO C. CALHOUN, Trustees, Complainants, *against* THE CHESAPEAKE AND OHIO RAILWAY COMPANY and Others, Defendants. } In Chancery.

This cause came on this day to be again heard on the papers formerly read, the proceedings and orders formerly had and entered herein, and the report of W. C. Wickham, special commissioner, this day filed, and the papers therein referred to and therewith returned, supplementary to his report of sale hereinbefore filed, and

155 was argued by counsel. And the court having considered the premises, it is hereby ordered, adjudged, and decreed that the action of the said special commissioner be, and the same is hereby, approved, and his said report is hereby confirmed; that the form of deed from the said special commissioner to the said purchasers presented with the commissioner's report be, and the same is hereby, approved, and the said special commissioner is hereby authorized and directed to execute and deliver to the said purchasers a deed of like form and tenor; that the form of trust deed to be executed by the corporation that will be created by the aforesaid conveyance, and which is declared in the said deed of conveyance to be a corporation under the name of The Chesapeake and Ohio Railway Company, to a trustee or trustees to be appointed by this court, in compliance with the said judgment and decree, and for the purposes

therein mentioned, presented with the said report, be, and the same is hereby, approved.

It is further ordered, adjudged, and decreed that Joseph Bryan and Henry T. Wickham be, and they hereby are, in pursuance of the said judgment and decree, appointed trustees to receive the said trust deed, cause the same to be duly recorded, and to execute the trusts thereof; and to the end that the said trustees may apply to this court in this cause for such instructions, directions, and relief in regard to the execution of the said trust as may be needful, the plaintiffs are directed and required by a proper amendment to their bill of complaint, by way of supplement, to make the said trustees and the said Chesapeake and Ohio Railway Company parties defendant to this cause.

And whereas it appears that the payments which have heretofore been made on account of the specific liens, taxes, and expenses of this cause, including the sum of two hundred thousand dollars paid in respect thereof, and of the said indebtedness of the Virginia Central Railroad Company to the commissioner, in pursuance of the terms of sale, in respect of which the said purchaser or purchasers are entitled to issue their obligations under the said deed of
156 trust, and to be secured thereby, amount in the aggregate to the sum of four hundred and thirty thousand one hundred and ninety dollars and ninety-five cents;

It is further ordered, adjudged, and decreed that such obligations to the amount aforesaid may now or at any time hereafter be created and issued by the said company under the said deed, and upon being duly certified by the said trustees and the said company to be so issued, the same shall stand secured by the said deed as in the said deed provided; and it shall be the duty of the said trustees to so certify the said obligations to the amount aforesaid whenever requested by the said company so to do, and also to certify in like manner from time to time, upon application of the said company, such other obligations as the said company may be or become entitled to issue under the said deed of trust, in pursuance of the several judgments and decrees hereinbefore entered in this cause, as modified by this decree.

It is further ordered, adjudged, and decreed that this cause remain upon the docket of this court, and stand continued, with leave to the said trustees to apply to this court from time to time for such instructions as may be needful touching the execution of the said trust, and for such relief as may be proper, in the event of any default on the part of the Chesapeake and Ohio Railway Company in complying with the provisions of the said trust deed, or in the event that such application may be needful for the preservation and protection of the trust property and estate and the due application of the same to the uses and purposes specified in the said deed of trust; and for all the purposes herein specified, this court doth retain the said cause, its jurisdiction over the same, over the parties thereto and the premises and property embraced in the said trust deed.

It is further ordered, adjudged, and decreed that upon the due execution and delivery of the conveyances above mentioned, the re-

ceiver do, and he is hereby directed to, turn over, transfer, and deliver the premises, and every part thereof, so sold and purchased as aforesaid, to the Chesapeake and Ohio Railway Company, to-
157 gether with any balance of the earnings and income thereof en in his hands, whether collected or uncollected.

It is further ordered, adjudged, and decreed that the 19th paragraph of the judgment and decree entered herein on the 26th day of March, 1877, be, and the same is hereby, amended by striking out of the said paragraph the words "or upon the receipt by him or them of the *of the* par value of the bonds so endorsed and delivered, with accrued interest in cash;" and also by striking out the words "the proceeds of the said bonds so paid into the hands of the said trustee or trustees in cash shall be applied by him or them as soon as practicable thereafter to the purchase or redemption of the said obligations secured by the said deed of trust at a price not exceeding par and accrued interest, and the said obligations when so surrendered to or redeemed by him or them shall be cancelled;" and by adding after the word "indebtedness," in the next preceding clause, the words "and any of the said obligations so surrendered to him or them shall be cancelled and delivered to the purchaser or purchasers, his or their representatives or assigns;" and also that the said paragraph be further amended by striking out the following words: "When all of the said purchase-money secured by the said deed of trust, in respect to which credit is given as aforesaid, shall have been paid, and the obligations representing the same extinguished, and the expenses of the trust shall have been paid, all of such bonds then remaining in the hands of the trustee or trustees shall be surrendered, and any balance of the proceeds of bonds remaining in his or their hands shall be paid over." The said trustees are hereby authorized and directed to report to this court when and, as obligations under this deed are issued and certified by them, the amount so issued and certified, and the amount and nature of the indebtedness in respect of which the same has been issued. It is further ordered and decreed that inasmuch as the exact amount of the charges and expenses payable out of the cash proceeds of sale cannot be presently ascertained and settled, that one hundred and fifty thousand dollars thereof be, and the same is hereby, set
158 apart for distribution to and among the several creditors whose debts are prior in point of lien to the mortgages in the 9th and 10th paragraphs of the said decree mentioned, and that fifty thousand dollars of such proceeds be set apart for the payment of such charges and expenses, and that any balance remaining of such sum, if any, after the payment of such charges and expenses, be dealt with and distributed as the court on application may direct.

A true copy. Test: ALFRED SHEILD, *Clk.*

(Endorsed:) C. & O. Railroad Co. *vs.* J. S. Miller, auditor. Exhibit "H." A copy. Teste: Sam'l B. McColloch, clerk.

EXHIBIT J.

Deed of Conveyance.

Williams C. Wickham, special commissioner, to the Chesapeake & Ohio Railway Company.

CHES. & OHIO RAILWAY CO. *vs.* JOS. S. MILLER, Auditor, &c.

A copy. Teste: SAM'L B. McCOLLOCH, *Clerk.*

An indenture, made the 1st day of July, 1878, by and between Williams C. Wickham, a special commissioner of the circuit court of the city of Richmond, in the State of Virginia, duly appointed in the suit in chancery hereinafter mentioned, and also a special commissioner of the circuit court of the county of Kanawha, in the State of West Virginia, in the suit in chancery hereinafter mentioned, party of the first part, and A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Junior, and John Castree, parties of the second part:

Whereas the Chesapeake and Ohio Railroad Company became and was a corporation under and by virtue of certain
159 statute laws of the respective States of Virginia and West Virginia, and did, under and by virtue of the said several statutes, and of various acts and proceedings lawfully had and done in pursuance thereof, become possessed of and did acquire a line of railroad, extending from a point on the James river below Richmond, in the State of Virginia, to a point on the Ohio river, in Cabell county, in the State of West Virginia, together with all the franchises, rights, privileges, lands, tenements, and hereditaments to said corporation appertaining or belonging, subject to certain existing liens and encumbrances upon that part of the premises theretofore known as the Virginia Central Railroad, and fully described in the judgments, orders, and decrees of the said circuit court of the city of Richmond, in the State of Virginia, and of the said circuit court for the county of Kanawha, in the said State of West Virginia, in the aforesaid suits;

And whereas on or about the 27th day of November, 1875, William Butler Duncan and Philo C. Calhoun, as trustees, did commence a suit in chancery in the said circuit court of the city of Richmond against the said Chesapeake and Ohio Railroad Company and others for the foreclosure of a certain deed of trust or mortgage executed and delivered by the said Chesapeake & Ohio Railroad Company to the said William Butler Duncan and Philo C. Calhoun, under date of January 15th, 1870, which said deed of trust or mortgage is fully set forth in the bill of complaint in the said suit, and in the judgments and decrees hereinafter referred to, to which reference is had;

And whereas on or about the 29th day of November, 1875, the said William Butler Duncan and Philo C. Calhoun did institute a certain other suit in chancery in the said circuit court for the county of Kanawha, in the State of West Virginia, for the foreclosure of the

same deed of trust or mortgage in respect of that part of the premises embraced therein situate in the said State of West Virginia;

And whereas such proceedings were had in the said suits, respectively, from time to time, that on the 26th day of March, 1877,
160 judgment and decree of foreclosure and sale was entered in the said suit so as aforesaid brought in the said circuit court of the city of Richmond, and afterwards such proceedings were had in the said suit that the said judgment and decree was modified and amended, as by reference thereto will appear, and on or about the 18th day of December, 1877, a judgment and decree of foreclosure and sale was duly made and entered in the said suit so brought in the said circuit court for the county of Kanawha, in the State of West Virginia;

And whereas in and by each of the said judgments and decrees the said Williams C. Wickham, party hereto of the first part, was appointed a special commissioner to make the sale provided for and directed in the said decrees, and in pursuance of such appointment did afterwards, to wit, on the 2d day of April, 1878, sell at public auction, at the city of Richmond, all and singular the premises, rights, privileges, and franchises which the said special commissioner was directed in and by said judgments and decrees to sell;

And whereas at such sale A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Junior, and John Castree, styling themselves a committee of purchase and reorganization, for themselves and others, became the purchasers thereof for the sum of two million seven hundred and fifty thousand dollars;

And whereas afterwards the said special commissioner did duly make his report of such sale to the said courts, respectively, and the said sale was duly confirmed by the said court, respectively;

And whereas the said purchasers having duly complied with the terms of sale, afterwards, to wit, on the 29th day of June, 1878, an order was made by the said circuit court of the city of Richmond, and on the 1st day of July, 1878, a similar order was entered in said circuit court of the county of Kanawha, authorizing and directing the said special commissioner to execute a deed of conveyance of all and singular the premises, rights, privileges, franchises, lands, tenements, and hereditaments so sold as aforesaid to the said purchasers thereof, subject, however, to all outstanding lawful contracts
161 and liabilities of Williams C. Wickham, the receiver in the said suits, as well as those made, entered into and incurred by him in his own name as receiver, as those made, entered into and incurred by him in the name of the said Chesapeake and Ohio Railroad Company, subject also to all taxes of every kind and description that may have been or may hereafter be established as liens existing upon the premises hereby conveyed at or prior to the date of these presents; subject also to such claims referred to and described in the said judgments and decrees, respectively, as may hereafter, in either of the above-mentioned causes, be determined to be liens upon the premises or some part thereof superior to the liens of the mortgages executed by the Chesapeake and Ohio Railroad

Company (foreclosed in the above-mentioned suits) upon the premises, or some part thereof hereby conveyed;

And whereas the said purchasers will upon the due execution and delivery of these presents, by force of the statute in such case made and provided, forthwith be and become a corporation by any name which may herein be set forth; and whereas, under and in pursuance of the said statutes, the said purchasers, parties hereto of the second part, have declared and do herein and hereby declare that the said name by which they shall by force of the said statute become a corporation is and shall be The Chesapeake and Ohio Railway Company;

And whereas it is the true intent and meaning of these presents that this conveyance shall enure to the use, benefit, and advantage of the said corporation so designated and described:

Now, therefore, this indenture witnesseth, that the said Williams C. Wickham, special commissioner as aforesaid, party hereto of the first part, in consideration of the premises, and of two million seven hundred and fifty thousand dollars in hand paid, and secured to be paid by a deed of trust, bearing even date with these presents, hath granted, bargained, sold, assigned, aliened, released, and confirmed, and by these presents doth grant, bargain, sell, assign, alien, release, and confirm, with special warranty unto the said A. S. Hatch,
162 C. P. Huntington, A. A. Low, Isaac Davenport, Jr., and John Castree, for the use, benefit, and advantage of the said corporation which is hereby created under the name and style of The Chesapeake and Ohio Railway Company, all and singular the rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances, and property of every description, whether real, personal, or mixed, embraced and included in the said judgments and decrees, and the sale under the same, described as follows, that is to say: The entire railroad of the said Chesapeake & Ohio Railroad Company, extending and now in operation from a point on the James river below Richmond, in the State of Virginia, to a point on the Ohio river, in the State of West Virginia, together with all its franchises, rights, and privileges, including its franchises for extensions, branches, bridges, and all other rights and privileges whatsoever to the said company belonging, lands, buildings, machinery, rolling-stock, materials, and other property, real and personal, a more particular description whereof is contained in the inventory and reports made by the receiver under the orders of the said courts, that is to say, all and singular the premises embraced in the mortgage or deed of trust to the board of public works of Virginia, executed by the Virginia Central Railroad Company, bearing date on the 1st day of April, 1850, including the rights, privileges, and franchises embraced in the said mortgage or deed of trust; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the trust deed to H. W. Fry, W. H. Macfarland, and James Lyons, executed by the said Virginia Central Railroad Company, bearing date on the 2d day of June, 1854; all and singular the premises, rights, privileges, and franchises included

and conveyed in and by the trust deed to John B. Young and Robert R. Howison, executed by the said Virginia Central Railroad Company, bearing date on the 6th day of February, 1866; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the trust deed to Philo C. Calhoun, William Butler Duncan, William Orton, and M. F. Maury, executed by the Chesa-
163 peake & Ohio Railroad Company, bearing date the 1st day of October, 1868; all and singular the premises, rights, privileges, and franchises included and conveyed in and by the trust deed executed by the said Chesapeake & Ohio Railroad Company to William Butler Duncan and Philo C. Calhoun, bearing date the 15th day of January, 1870; and all and singular the premises, rights, privileges, and franchises included and conveyed in and by the trust deed executed by the said Chesapeake & Ohio Railroad Company to the said Philo C. Calhoun and William K. Kitchen, bearing date the first day of October, 1872; and all other property of every kind and description, if any, of which the said corporation was possessed at the time of the said sale, in accordance with the statutes in said case made and provided.

To have and to hold all and singular the above-mentioned premises, rights, privileges, interests, franchises, lands, tenements, hereditaments, appurtenances, and property of every description, whether real, personal, or mixed, hereby conveyed, or intended so to be, with all the right, title, and interest of the said Chesapeake & Ohio Railroad Company, the board of public works of the State of Virginia, James Lyons, sole surviving trustee; John B. Young and Robert R. Howison, trustees; William Butler Duncan, Philo C. Calhoun, and William Orton, surviving trustees; William Butler Duncan and Philo C. Calhoun, trustees, and John Castree, substituted trustee, and all other parties to the above-mentioned causes, unto the said A. S. Hatch, A. A. Low, C. P. Huntington, Isaac Davenport, Jr., and John Castree, for the use, benefit, and advantage of the said corporation hereby created, its successors and assigns forever; subject, however, to all taxes of every kind and description that may have been or may hereafter be established as liens existing upon the premises hereby conveyed at or prior to the date of these presents; and also subject to all outstanding lawful contracts and liabilities of Williams C. Wickham, the receiver in the said suits, as well those made, entered into, and incurred by him in his own name as receiver as those made, entered into, and incurred by him in
164 the name of the Chesapeake & Ohio Railroad Company; subject, also, to such claims referred to and described in the said judgments and decrees, respectively, as may hereafter, in either of the above-mentioned causes, be determined to be liens upon the premises, or some part thereof, superior to liens of the mortgages executed by the Chesapeake & Ohio Railroad Company; subject, also, to a lien for that part of the purchase-money, being part of the consideration expressed herein, which in and by the said judgments and decrees, to which reference is had, is required to be secured by a trust deed of all and singular the premises hereby conveyed; and

subject, also, to all contracts and agreements which have been entered into by the said A. S. Hatch, A. A. Low, C. P. Huntington, Isaac Davenport, Jr., and John Castree, with reference to the purchase of the said property, and the payment of all sums which have been charged by them upon the property of the said corporation hereby created, in connection with and in pursuance of the said purchase, all of which are to be assumed, discharged, and paid by the said corporation. And all such contracts and liabilities of the receiver, and all contracts, agreements, and undertakings heretofore entered into by the parties of the second part, for and on behalf of the said corporation, and in anticipation of its creation, are hereby expressly charged on the corporation as obligations and liabilities to be assumed and performed by it for the indemnity of the said receiver and the said parties of the second part. And the premises hereby conveyed, and every part of the same, are hereby charged with a lien for such indemnity, in respect of all such contracts, liabilities and undertakings, as aforesaid.

In witness whereof, the parties hereto have hereunto set their hands and seals, at the city of Richmond aforesaid, the day and year first above written.

WMS. C. WICKHAM, [SEAL.]
Special Commissioner.
A. S. HATCH. [SEAL.]
C. P. HUNTINGTON. [SEAL.]
A. A. LOW. [SEAL.]
I. DAVENPORT, JR. [SEAL.]
JOHN CASTREE. [SEAL.]

165 STATE OF VIRGINIA, *City of Richmond,* } *to wit:*

I, Wm. E. Sparrow, a notary public for the city aforesaid, in the State of Virginia, do certify that Wms. C. Wickham, special commissioner; A. S. Hatch, C. P. Huntington, A. A. Low, I. Davenport, Jr., and John Castree, whose names are signed to the foregoing writing, bearing date on the first day of July, 1878, have acknowledged the same before me in my city aforesaid.

Given under my hand and notarial seal, this 1st day of July, 1878.

[SEAL.] WM. E. SPARROW,
Notary Public.

STATE OF WEST VIRGINIA:

GREENBRIER COUNTY COURT, CLERK'S OFFICE, *July 3d*, 1878.

This deed from William C. Wickham, special commissioner of the circuit court of the city of Richmond, in the State of Virginia, of the first part, and A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Jun'r, and John Castree, parties of the second part, for the use and benefit, &c., of the Chesapeake and Ohio Railway Company, bearing date the 1st day of July, 1878, for the entire railroad of the late Chesapeake and Ohio Railroad Company, extending and now in operation from a point on the James river below the city of Richmond, in the State of Virginia, to a point on the Ohio river in the State of West Virginia, with all its rights, privileges, franchises, including lands, buildings, rolling-stock, &c., &c., &c., was on this day presented in this office, and, with the certificate endorsed thereon, the said deed of conveyance is admitted to record.

Teste: MARK L. SPOTTS,
Clerk of Greenbrier County.

166 WEST VIRGINIA:

IN MONROE COUNTY COURT, CLERK'S OFFICE, *July* 5, 1878.

This day the foregoing writing, with the certificate thereto annexed, was presented in said office and admitted to record therein.

Teste: JAMES CAMPBELL,
Clk Co. Ct., Monroe Co.

WEST VIRGINIA:

IN SUMMERS COUNTY COURT, CLERK'S OFFICE, *July* 5, 1878.

This day the foregoing writing, with the certificates thereto annexed, was presented in said office and admitted to record therein, at 6 o'clock p. m.

Teste: E. H. PECK,
Clerk Summers County Court.

THE STATE OF WEST VIRGINIA:

FAYETTE COUNTY, CLERK'S OFFICE, *July* 6, 1878.

The foregoing deed, and the several certificates thereto annexed, was this day received in this office at 6 o'clock 30 minutes p. m., and is admitted to record.

Teste: G. M. BLUME, *Clerk.*

STATE OF WEST VIRGINIA:

KANAWHA COUNTY COURT, CLERK'S OFFICE,
July 8, 1878, *at* 9 *o'clock a. m.*

This deed from the Chesapeake and Ohio Railroad Company, by William C. Wickham, special commissioner, to the Chesapeake
167 and Ohio Railway Company, was this day received in my

office; and thereupon, together with the various certificates thereto annexed, is admitted to record.

Teste: JOEL S. QUARRIER,
Clerk Kanawha County Court.

Copy. Teste: HAMILTON MORRIS,
Clerk Kanawha County Court.

Endorsed: Deed of conveyance. Williams C. Wickham, special commissioner, to the Chesapeake and Ohio Railway Company.

EXHIBIT K.—*A Detailed Statement of the Amount of Taxes due from the Chesapeake and Ohio Railway Company for State, State School, County, and District Purposes.*

AUDITOR'S OFFICE, WHEELING, W. VA., *December the 10th*, 1879.

For the year 1879.	Valuation & apportionment.	Rate of levy.	Amount of State and State school tax.	Amount of county tax.	Amount of district tax.	State, county, and district tax.	Grand total.
Total valuation of railway property in Cabell county	248,000 00						
Tax thereon for general State purposes		20	496 00				
" " " " school "		10	248 00			744 00	
" " " " county "		70		1,736 00		1,763 00	
" " " " district and county poor tax.							
In Huntington, Ind., district	93,560 00	22½			210 51	210 51	
Guyandotte "	35,640 00	75			267 30	267 30	
Barboursville "	47,520 00	90			427 68	427 68	
Same for county poor tax	47,520 00	15		71 28		71 28	
Barboursville, Ind., district	3,960 00	50			19 80	19 80	
Same for county poor tax	3,960 00	15		5 94		5 94	
Grant district	67,320 00	95			639 54	639 54	
Same for county poor tax	67,320 00	15		100 98		100 98	
Total			744 00	1,914 20	1,564 83	4,223 03	4,223 03

169 Total valuation of railway property in Putnam county	112,270 00						
Tax thereon for general State purposes		20	224 54				
" " " " school "		10	112 27			336 18	
" " " " county "		90		1,010 43		1,010 43	
" " " " district and county road tax.							
In Scott district	52,203 70	57			297 56	297 56	
Same for county road tax	52,203 70	05		26 10		26 10	
Teay's Valley district	36,032 41	30			108 07	108 07	
Same for county road tax	36,032 41	05		18 07		18 07	
Curry district	24,033 89	60			144 20	144 20	
Same for county road tax	24,033 89	05		12 02		12 02	
Total			336 81	1,066 62	549 83	1,953 26	1,953 26
Total valuation of railway property in Kanawha county	324,840 00						
Tax thereon for general State purposes		20	649 68				
" " " " school "		10	324 84			974 52	
" " " " county "		75		2,436 30		2,436 30	
" " " " district "							
In Jefferson district	78,844 66	65			512 49		
St. Albans "	6,307 57	30			18 92		
Louden "	129,305 24	75			969 78		
Cabin Creek "	110,382 53	70			772 68	2,273 87	
Total			974 52	2,436 30	2,273 87	5,684 69	5,684 69

A Detailed Statement of the Amount of Taxes due from the Chesapeake and Ohio Railway Company for State, State School, County, and District Purposes.

AUDITOR'S OFFICE, WHEELING, W. VA., *December the 10th*, 1879.

For the year 1879.	Valuation and apportionment.	Rate of levy.	Amount of State and State school tax.	Amount of county tax.	Amount of district tax.	State, co'nty and district tax.	Grand total.
Total valuation of railroad property in Fayette county	448,100 00						
Tax thereon for general State purposes		20	896 20				
" " " school "		10	448 10				
" " " county "		80				1,344 30	
" " " district "				3,584 80		3,584 80	
In Kanawha district	120,000 00	85			1,020 00		
Mountain Cove district	100,000 00	75			750 00		
Fayettesvtlle "	72,000 00	65			468 00		
Sewell Mountain "	156,100 00	80			1,248 80	3,486 80	
Total			1,344 30	3,584 80	3,486 80	8,415 90	8,415 90

171	Total valuation of railway property in Summers county	289,710 00						
	Tax thereon for general State purposes		20	579 42				
	" " " school "		10	289 71			869 13	
	" " " county "		80		2,317 68		2,317 68	
	" " " district "							
	In Greenbrier district	109,710 00	75			822 83		
	Green Sulphur district	87,500 00	80			700 00		
	Talcott district	92,500 00	75			693 75	2,216 58	
	Total			869 13	2,317 68	2,216 58	5,403 39	5,403 39
	Total valuation of railway property in Monroe county	17,040 00						
	Tax thereon for general State purposes		20	34 08				
	" " " school "		10	17 04			51 12	
	" " " county "		28		47 71		47 71	
	" " " district "							
	In Wolf Creek district	17,040 00	28			47 71	47 71	
	Total			51 12	47 71	47 71	146 54	146 54

172 *A Detailed Statement of the Amount of Taxes due from the Chesapeake and Ohio Railway Company for State, State School, County, and District Purposes.*

AUDITOR'S OFFICE, WHEELING, W. VA., *December the 10th*, 1879.

For the year 1879.	Valuation and apportionment.	Rate of levy.	Amount of State and State school tax.	Amount of county tax.	Amount of district tax.	State, county, & district tax.	Grand total.
Total valuation of railway property in Greenbrier county	235,580 00						
Tax thereon for general State purposes		20	471 16				
" " " school "		10	235 58			706 74	
" " " county "		27½		647 85		647 85	
" " " district and county road tax.							
In White Sulphur district	78,526 66⅔	15			117 79	117 79	
same to county road tax	78,526 66⅔	5		39 26		39 26	
Irish Corner district	78,526 66⅔	10			78 53	78 53	
same for county road tax	78,526 66⅔	5		39 26		39 26	
Fort Spring district	78,526 66⅔	50			392 60	392 60	
same for county road tax	78,526 66⅔	10		78 56		78 56	
Total			706 74	804 93	588 92	2,100 59	2,100 59

Recapitulation.

	Amount of State and State school tax.	Amount of county tax.	Amount of district tax.	State, county, & district tax.	Grand total.
Cabell Co.	744 00	1,914 20	1,564 83	4,223 03	
Putnam Co.	336 81	1,066 62	549 83	1,953 26	
Kanawha Co.	974 52	2,436 30	2,273 87	5,684 69	
Fayette Co.	1,344 30	3,584 80	3,486 80	8,415 90	
Summers Co.	869 13	2,317 68	2,216 58	5,403 39	
Monroe Co.	51 12	47 71	47 71	146 54	
Greenbrier Co.	706 74	804 93	588 92	2,100 59	
	5,026 62	12,172 24	10,728 54	27,927 40	27,927 40

AUDITOR'S OFFICE,
WHEELING, W. VA., *Dec. 10th*, 1879.

The foregoing is a correct statement, as appears from the records in the auditor's office of West Virginia.

JOS. S. MILLER, *Auditor.*

(Endorsed:) Chesapeake & Ohio Railway Co. *vs.* J. S. Miller, auditor, &c. Exhibit "K." A copy. Teste: Sam'l B. McColloch, cl'k.

EXHIBIT L.

STATE OF WEST VIRGINIA,
AUDITOR'S OFFICE, WHEELING, *Dec.* 10, 1879.

To the President of the Chesapeake & Ohio Railway Co.

DEAR SIR: I transmit herewith a detailed statement of the taxes assessed against the Chesapeake and Ohio Railroad Company in the State of West Virginia, for the year 1879. If payment of the amount so assessed be made at the treasury of this State on or before the 20th day of January next, two and a half ($2\frac{1}{2}$) per centum will be deducted therefrom. If not paid by said 20th day of January it will be my duty to add ten per centum to the amount and certify to the proper officers for collection.

Very respectfully,

JOS. S. MILLER,
Auditor of W. Va.

174 Whereupon the defendant, being duly summoned, and not appearing, on motion of the complainant, by counsel, it was ordered that it have a decree *nisi* against the defendant.

And at another day, to wit, at rules held in the clerk's office of said court, at the court-house thereof, on the first Monday in March, 1880, the defendant still failing to appear, answer, or demur, on motion of complainant, by its counsel, the decree *nisi*, heretofore entered against the defendant, was confirmed, and the bill taken for confessed, and the cause set for hearing.

And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house thereof, on the 3d day of May, 1880:

THE CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
JOSEPH S. MILLER, Auditor of the State of West Virginia.

This 3d day of May, 1880, came the said Joseph S. Miller, auditor of the State of West Virginia, and filed his demurrer to the plaintiff's bill of complaint filed against him, and gave notice of his motion to dissolve the injunction heretofore awarded the complainant. Whereupon the matters and things arising upon said demurrer and motion are set down for argument on Tuesday, the 11th day of May, 1880, or as soon thereafter as may be.

Demurrer.

In the Circuit Court of Ohio County.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiffs,
[*vs.*]
JOSEPH S. MILLER, Auditor of the State of West Virginia, Defendant.

The demurrer of Joseph S. Miller, auditor of the State of West Virginia, to the bill of complaint of the Chesapeake and Ohio Railway Company, filed in the circuit court of Ohio county, West Virginia:

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same
175 are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer sheweth that in case the allegations in said bill contained are true, as therein set forth, which he doth not admit, the said bill contains not any matter of equity whereon to sustain such writ of injunction as is sought and prayed for in and by said bill, nor hath the said complainant by its said bill made such a case as entitles it in a court of equity to any relief from or against this defendant touching the matters contained in said bill, or any such matters; and for further cause of demurrer the defendant sheweth that it appears by said bill, and particularly by Exhibit "K," filed therewith and as a part thereof, that the following municipal corporations within the State of West Virginia are necessary parties to said bill, to wit, the county of Cabell and four districts therein, the county of Putnam and three districts therein, the county of Kanawha and four districts therein, the county of Fayette and four districts therein, the county of Summers and three districts therein, the county of Monroe and one district therein, and the county of Greenbrier and three districts therein, yet the said municipal corporations are not made parties to said bill.

And for further cause of demurrer, this defendant sheweth that in case the allegations contained in said bill are true, as therein set forth, this court has no jurisdiction to hear and determine the said matters and things, and to grant the relief prayed for in said bill. Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to said bill and to all matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make further or other answer to said bill, and he prays hence to be dismissed with his reasonable costs in this behalf expended.

JOSEPH S. MILLER,
Auditor of the State of West Virginia.
By ROBERT WHITE,
Attorney General of West Virginia.

176 And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house thereof, in part 2, on the 2d day of May, 1881.

Order.

CHES. & OHIO RAILWAY CO. }
vs. } In Chancery.
JOSEPH S. MILLER, Auditor. }

This cause came on to be heard this 2d day of May, 1881, upon the bill and exhibits filed therewith, and upon the demurrer of the defendant to the plaintiff's bill heretofore filed, and joinder therein, and was argued by counsel. Upon consideration whereof, the court being of opinion that upon said demurrer the law is for the plaintiff, and thereupon doth adjudge, order, and decree that said demurrer be overruled, and doth overrule the same. And thereupon came the defendant, by his attorney, and filed his answer to the bill in this case, and gave notice of his motion to dissolve the injunction heretofore awarded in this cause.

Answer of Joseph S. Miller.

In the Circuit Court of Ohio County, W. Va.

THE CHESAPEAKE & OHIO RAILWAY COMPANY }
vs. } In Chancery.
JOSEPH S. MILLER, Auditor State of West Virginia. }

The answer of Joseph S. Miller, auditor of the State of West Virginia, to a bill in chancery exhibited against him by the Chesapeake & Ohio Railway Company, in the circuit court of Ohio county:

This respondent, saving — reserving to himself the benefit of all and every exception to said bill, and the benefit of demurrer thereto, for answer to said bill, or so much thereof as he is advised it is material for him to make answer thereto, answering, says that it is true, as stated in the complainant's bill, that an act was passed by the Legislature of Virginia on the 18th of February, 1836, incorporating the stockholders of the Louisa Railroad Company,
177 and that said road was constructed and operated in the manner set forth in said bill of complaint, and that under the acts of March 8th, 1847, and March 27th, 1848, the said road was subsequently extended to the eastern base of the Blue Ridge on the west and the city of Richmond on the east; that under the act of March 5th, 1849, the Board of Public Works of Virginia were authorized to construct, and afterwards did construct, a railroad and tunnel from the eastern to the western base of the Blue Ridge; that under the said act of March 5th, 1849, and the acts of January 30th, 1850, and February 2d, 1850, the said line of railway was continued under the designation of the Virginia Central Railroad Company, and was, in the spring of 1861, completed as far as Jackson's river, in the county of Allegheny; that the work was then interrupted, and was carried no further until 1867, when it was completed to Covington; that under the act of February 15, 1853, the board of public works was authorized to construct a railroad from Covington to the Ohio river on State account, and that the construction of that

part of the work was undertaken by the Commonwealth of Virginia, and was prosecuted by means of appropriations under several acts of the Legislature until 1861, and that up to that date a large sum of money was expended on the work by the State. Respondent does not admit that the work of construction done by the State of Virginia within the territorial limits of what is now the State of West Virginia was or could be considered as having devolved upon the State of West Virginia, so that the same has passed by virtue of any of the acts in the bill mentioned to complainant in this cause.

Your respondent admits the passage of the act — March 1st, 1866, in the bill mentioned, but knows nothing personally of the passage of the act of 26th day of February, 1866, by the General Assembly of Virginia, and, therefore, calls for strict proof; nor does he admit that the deductions drawn by said bill from the clause contained in the 7th section of said act of March 1st, 1866, are there correctly drawn.

178 Respondent admits the passage of the act by the Legislature of West Virginia on the 26th day of February, 1867, but he insists that this court must construe said act for itself, and determine the effect thereof, and he calls for proof, if any there is, of the passage of the act of the General Assembly of Virginia of March 1st, 1867, referred to in the bill.

Respondent knows nothing personally of the contract of the 31st of August, 1868, set up in the bill, further than appears by the act of the Legislature of West Virginia, passed January 26th, 1870, but he insists that neither said contract nor the act of the Legislature of January 26th, 1870, vested, or could be construed to vest, any property, rights, or franchises other than were clearly and expressly conferred and given by the Legislature, and particularly does he deny that *any personal immunity* vested in either the Covington and Ohio Railroad Company or the Chesapeake and Ohio Railroad Company by virtue of said acts of the Legislature, so as to relieve the said companies from the right of the State of West Virginia, and of the counties and school districts therein, to impose upon any property of said companies, or either of them, taxes.

And respondent insists that said Covington and Ohio Railroad Company, which was sought to be incorporated by said act of March 1st, 1866, never, indeed, became a corporation or invested with any corporate powers, rights, privileges, franchises or immunities whatever; and he further avers that no such certificate, such as is mentioned in the 10th section of said act, was ever made.

Whether the Chesapeake and Ohio Railroad Company was ever formed and organized in accordance with the said acts of the Legislature referred to in the bill does not appear thereby, and respondent calls for strict proof of the allegation of the bill in that regard.

Respondent knows nothing personally of the deeds of trust or mortgages set up in the bill or of the suits instituted and carried on in the circuit courts of the city of Richmond, Virginia, and

179 Kanawha county, W. Va., or of the decrees therein as alleged

in said bill, and calls for strict proof of the allegations in regard thereto.

Respondent does not admit that said Chesapeake & Ohio Railway Company, if any such indeed exists, has, by reason of the matters and things set forth in said bill, "become entitled to all the works, property, estates, rights, franchises, and privileges theretofore owned, used, and enjoyed by the Chesapeake & Ohio Railroad Company," and especially does he deny that *that* the complainant, if indeed it exists as a legal corporation, is entitled to any exemption from taxation either State or local, on its property within the State of West Virginia. Respondent denies, too, that the deeds of trust or mortgage, professed to have been executed by said Chesapeake & Ohio Railroad Company, if ever executed, could or did carry with them any immunity from such taxation, or that such immunity did or could pass by the sale mentioned in said bill, or by the confirmation of such sale, or in any way, to said complainant.

Respondent further insists that any act of the Legislature of West Virginia passed since it became a State which authorized or attempted to authorize or agree to the exemption of any property of a railroad company from taxation in any way was in itself *ultra vires*, unconstitutional, null, and void, and could not even vest any right of exemption to or become in any way a contract with such company.

And he further insists that if any exemption from taxation could by any means have ever been vested either in the Covington & Ohio Railroad Company or the Chesapeake and Ohio Railroad Company, that such exemption was a privilege and immunity personal to such company, and not transferable either by deed of trust, mortgage, a decree of sale and confirmation thereof, or deed made in pursuance of such decree. And he more particularly insists that no such right of exemption ever vested in any way in the complainant, even if the court should hold that said complainant is in law a corporation entitled to hold, use, and enjoy property or corporate franchises.

180 And respondent submits that the complainant is not such corporation entitled to the rights, franchises, privileges, and immunities as claimed in said bill. Respondent further insists that even if any immunity from taxation ever became vested that the construction placed by the complainant on said section 7 of the act of March 1st, 1866, is not the true construction thereof; but, on the contrary, he submits that the taxation referred to in said section means only such taxes as the State could impose for general State purposes, and had and could not have any reference whatever to the local county and school taxes in the counties and school districts through which said road runs; and that the profits of said company in said section referred to did not mean yearly profits of ten per cent. on the capital of said company, but, on the contrary, meant the aggregate amount of profits on the actual money capital of said company. Respondent has no means at his command of knowing how much the profits of said companies, or either of them, have amounted to, and he insists that before the prayer of the complainant can be in any way entertained, it should be required to

show such state of facts as that the court may thereby clearly see what the aggregate amount of the profits of the said Chesapeake & Ohio Railroad Company and of said complainant were and have been from the time of their supposed organization until said act of 1879 was passed.

Respondent admits that he did make out and transmit the detailed statement accompanied by the *latter* named in the bill, but he insists that he did this as a part only of the duties imposed upon him by the act of March 7th, 1879, which act he insists is and was a legal, constitutional, and binding law, and that not only the statement and letter aforesaid were made and sent, but each and every other duty imposed by or required of said act was done and performed by him as an executive officer of the State of West Virginia, and for and on behalf of said State; and he submits that the judicial branch of the government of said State ought not to and cannot interfere with him in the discharge of his duties under said law, particularly to interfere with the performance by him of a part of said duties, and thus to stop the State itself in the exercise of its sovereign powers by practically and to all intents and purposes enjoining it and making it a defendant to said bill; and especially does respondent deny the allegation in said bill contained that in making and sending said letter and statement he bases his action in the premises on an act of the Legislature of West Virginia, passed 31st day of January, 1879, but, on the contrary, he alleges that he has entirely performed his duties, including the acts aforesaid, under and by virtue of the said act of March 7th, 1879, and an act of February 4th, 1879.

181

And respondent further insists that the making and sending of said statement and letter was not and could not be the enforced collection by this respondent of the taxes named in the bill, or any part thereof. Indeed, he insists that these acts of his in themselves did not and could not do injury to the complainant, however injury might be afterwards done by others who might thereafter attempt to collect said taxes, or any of them. Respondent denies that said taxes named in said bill are illegal and void, as therein claimed, and he prays that the injunction heretofore awarded in this cause may be dissolved, and that he may be dismissed with his reasonable costs.

JOS. S. MILLER,
Auditor of the State of West Virginia.

STATE OF WEST VIRGINIA, *ss:*
Ohio County, to wit:

Joseph S. Miller, the defendant named in the foregoing answer, being duly sworn, says that the facts and allegations therein contained, so far as they are stated on his own knowledge, are true, and that so far as they are stated upon information, he believes them to be true.

JOS. S. MILLER, *Defendant.*

182 Taken, sworn to, and subscribed before me, this 11th day of May, 1880.

W. P. ADAMS,
Notary Public, Ohio Co., W. Va.

And at another day, to wit, at a circuit court, part 2, held for the county of Ohio, at the court-house thereof, on the 4th day of May, 1881:

Order.

THE CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
JOSEPH S. MILLER, Auditor, &c. } In Ch'y.

This day came again the parties to this cause, by their attorneys, and thereupon the complainant replies generally to the answer of the defendant filed herein on May 2, 1881, and, by consent of all the parties to this cause, by their attorneys, it is agreed that on the hearing of this cause, and in all proceedings to be had therein, the court may refer to, examine, and consider such printed copies of the several acts of the General Assembly of the State of Virginia, mentioned and referred to in the complainant's bill herein, as are printed in any book or books purporting to be a copy or copies of the session acts of the said General Assembly, with the same and like effect as if duly certified and exemplified copies of said acts, and each of them, were filed with the papers in this cause; and, by like consent, it is agreed that the copies of the orders and proceedings of the circuit court of the city of Richmond, Virginia, and of the circuit court of the county of Kanawha, West Virginia, which are mentioned in and filed with the complainant's bill herein, shall, in the hearing of this cause, and in all the proceedings to be had therein, be deemed and taken to be true and correct copies of such orders and proceedings, and of each of them; and, by like consent, it is agreed that any affidavits taken without notice and filed by plaintiff in the papers of this cause before the 1st day of June, 1881, may be used as evidence herein to the same effect and so far as the state-
183 ment contained therein could be used in evidence if they appeared in depositions taken under notice herein by the plaintiff in the absence of the defendant or his counsel.

And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house thereof, on the 31st day of May, 1881, part 2:

THE CHESAPEAKE & OHIO RAILWAY COMPANY
vs
JOSEPH S. MILLER, Auditor of the State of West Virginia. } In Chancery.

This 31st day of May, 1881, came the parties, by their attorneys, and the complainant having tendered an affidavit of Edward T. Tournier, its treasurer, taken under an agreement embodied in a former order entered in this cause, the said affidavit is ordered to be filed and made part of the record of this cause.

Affidavit.

THE CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
JOSEPH S. MILLER, Auditor of West Virginia, Defendant. } In Chancery.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

Edward T. Tournier, being duly sworn, says that he is treasurer of the Chesapeake and Ohio Railway Company, the complainant in the above-entitled suit now pending in the circuit court of Ohio county, West Virginia, and that he has been such treasurer ever since the creation and organization of said company; that as such treasurer affiant is familiar with the financial business and affairs of said company, and has in his possession and custody the books of the said company, in which appear the capital of said company and detailed and itemized statements of all its receipts and expenditures from its creation and organization up to this time.

Affiant further says that he was for many years and up to July 1, 1878, in the employ of the Chesapeake and Ohio Railroad
184 Company in the capacity of book-keeper in the principal office of said company; that as such book-keeper he was familiar with the financial business and affairs of the said Chesapeake and Ohio Railroad Company, and with the books of the said company in which appear the capital of said company and detailed and itemized statements of its receipts and expenditures from its creation and organization up to July 1, 1878, when it was dissolved by the formation of the Chesapeake and Ohio Railway Company; that the said books of the said Chesapeake and Ohio Railroad Company are now in the possession and custody of this affiant, as treasurer of the Chesapeake and Ohio Railway Company.

Affiant further says that the profits of the Chesapeake & Ohio Railway Company and the profits of the Chesapeake and Ohio Railroad Company, and of either or both of said companies, have never at any time amounted to ten per cent. a year on the capital of said companies, or either of them. In fact, affiant says that the aggregate profits of the Chesapeake and Ohio Railway Company and of the Chesapeake and Ohio Railroad Company, from the formation of the Chesapeake and Ohio Railroad Company up to this time, have not amounted to ten per cent. on the capital of said Chesapeake and Ohio Railway Company or of the Chesapeake and Ohio Railroad Company.

EDW'D T. TOURNIER.

Subscribed and sworn to before me this 18 day of May, 1881, as witness my hand and notarial seal, at New York city, county, and State.

[SEAL.]

CHARLES EDGAR MILLS,
A Commissioner for the State of West Virginia in New York.

182 Taken, sworn to, and subscribed before me, this 11th day of May, 1880.

W. P. ADAMS,
Notary Public, Ohio Co., W. Va.

And at another day, to wit, at a circuit court, part 2, held for the county of Ohio, at the court-house thereof, on the 4th day of May, 1881:

Order.

THE CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
JOSEPH S. MILLER, Auditor, &c. } In Ch'y.

This day came again the parties to this cause, by their attorneys, and thereupon the complainant replies generally to the answer of the defendant filed herein on May 2, 1881, and, by consent of all the parties to this cause, by their attorneys, it is agreed that on the hearing of this cause, and in all proceedings to be had therein, the court may refer to, examine, and consider such printed copies of the several acts of the General Assembly of the State of Virginia, mentioned and referred to in the complainant's bill herein, as are printed in any book or books purporting to be a copy or copies of the session acts of the said General Assembly, with the same and like effect as if duly certified and exemplified copies of said acts, and each of them, were filed with the papers in this cause; and, by like consent, it is agreed that the copies of the orders and proceedings of the circuit court of the city of Richmond, Virginia, and of the circuit court of the county of Kanawha, West Virginia, which are mentioned in and filed with the complainant's bill herein, shall, in the hearing of this cause, and in all the proceedings to be had therein, be deemed and taken to be true and correct copies of such orders and proceedings, and of each of them; and, by like consent, it is agreed that any affidavits taken without notice and filed by plaintiff in the papers of this cause before the 1st day of June, 1881, may be used as evidence herein to the same effect and so far as the state-
183 ment contained therein could be used in evidence if they appeared in depositions taken under notice herein by the plaintiff in the absence of the defendant or his counsel.

And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house thereof, on the 31st day of May, 1881, part 2:

THE CHESAPEAKE & OHIO RAILWAY COMPANY
vs
JOSEPH S. MILLER, Auditor of the State of West Virginia. } In Chancery.

This 31st day of May, 1881, came the parties, by their attorneys, and the complainant having tendered an affidavit of Edward T. Tournier, its treasurer, taken under an agreement embodied in a former order entered in this cause, the said affidavit is ordered to be filed and made part of the record of this cause.

Affidavit.

THE CHESAPEAKE & OHIO RAILWAY COMPANY
vs.
JOSEPH S. MILLER, Auditor of West Virginia, Defendant.
} In Chancery.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Edward T. Tournier, being duly sworn, says that he is treasurer of the Chesapeake and Ohio Railway Company, the complainant in the above-entitled suit now pending in the circuit court of Ohio county, West Virginia, and that he has been such treasurer ever since the creation and organization of said company; that as such treasurer affiant is familiar with the financial business and affairs of said company, and has in his possession and custody the books of the said company, in which appear the capital of said company and detailed and itemized statements of all its receipts and expenditures from its creation and organization up to this time.

Affiant further says that he was for many years and up to July 1, 1878, in the employ of the Chesapeake and Ohio Railroad
184 Company in the capacity of book-keeper in the principal office of said company; that as such book-keeper he was familiar with the financial business and affairs of the said Chesapeake and Ohio Railroad Company, and with the books of the said company in which appear the capital of said company and detailed and itemized statements of its receipts and expenditures from its creation and organization up to July 1, 1878, when it was dissolved by the formation of the Chesapeake and Ohio Railway Company; that the said books of the said Chesapeake and Ohio Railroad Company are now in the possession and custody of this affiant, as treasurer of the Chesapeake and Ohio Railway Company.

Affiant further says that the profits of the Chesapeake & Ohio Railway Company and the profits of the Chesapeake and Ohio Railroad Company, and of either or both of said companies, have never at any time amounted to ten per cent. a year on the capital of said companies, or either of them. In fact, affiant says that the aggregate profits of the Chesapeake and Ohio Railway Company and of the Chesapeake and Ohio Railroad Company, from the formation of the Chesapeake and Ohio Railroad Company up to this time, have not amounted to ten per cent. on the capital of said Chesapeake and Ohio Railway Company or of the Chesapeake and Ohio Railroad Company.

EDW'D T. TOURNIER.

Subscribed and sworn to before me this 18 day of May, 1881, as witness my hand and notarial seal, at New York city, county, and State.

[SEAL.]

CHARLES EDGAR MILLS,
A Commissioner for the State of West Virginia in New York.

Endorsed: Def't, by his counsel, not objecting to the form of within testimony as being by affidavit instead of depositions,
185 yet insists that witness does not prove the allegations of the bill with reference to the profits of plaintiff and of the Ches. & Ohio Railroad Company, nor is it evidence sufficient to show that such profits have not been made within the meaning of the statute governing such companies and *there* rights, privileges, and immunities, duties and obligations.

JOSEPH S. MILLER.
Auditor of the State of West Virginia,
By ROB'T WHITE, *Attorney.*

May 31, '81.
Received by mail and filed May 28, 1881.
S. B. McCOLLOCH, *Clerk.*

And at another day, to wit, at a circuit court, part 2, held for the county of Ohio, at the court-house thereof, on the 6th day of June, 1881:

Final Decree.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
vs.
JOSEPH S. MILLER, Auditor of the State of West Virginia. } In Chancery.

This day came the parties to this cause, by their attorneys, and thereupon the defendant not objecting to a hearing at this time, this cause came on to be finally heard on the papers formerly filed and the proceedings formerly had therein, including the bill and exhibits, the acts of the General Assembly of Virginia, and of the Legislature of West Virginia therein referred to, the answer of the defendant and replication to said answer, the orders and agreements heretofore made herein, and the affidavit of Edward T. Tournier, and exceptions thereon endorsed, and was argued by counsel. On considera[tion] whereof, the court is of opinion and doth decide that the alleged taxes for 1879, described in the bill and proceedings herein, amounting in the aggregate to $27,927.40, claimed to be due from complainant, and claimed to have been assessed on complainant's property, and each and every item of said alleged taxes, is illegal and void, and constitutes no valid claim or charge upon complainant or its property, for the reason that neither
186 complainant or its property in West Virginia was subject to taxation for the year 1879, but was and is exempt therefrom for said year 1879, and that the complainant should not be compelled or required to pay the said alleged taxes, or any part thereof, nor should the enforced collection thereof, or any part thereof, by the auditor of the State of West Virginia, or by any one under his authority or with his sanction, be made or permitted. It is therefore adjudged, ordered, and decreed that the motion to dissolve the injunction heretofore awarded herein be, and the same is hereby, overruled, and the said injunction is made perpetual, and the de-

fendant, Joseph S. Miller, the auditor of the State of West Virginia, and all others, are forever inhibited, restrained, and enjoined from adding to the amount of the alleged taxes, as described in the bill and proceedings herein, ten per centum, or any other sum, and from certifying said taxes to the sheriffs of the counties mentioned in the auditor's statement and letter referred to in and filed with complainant's bill as Exhibits "K" and "L," or any or either of said counties, for collection, or for any other purpose, or from doing anything whatever looking or tending to the collection of said alleged taxes, or any part thereof, from complainant or out of its property.

No costs are decreed against the defendant for the reason that he is sued in his official character.

WEST VIRGINIA, }
Ohio County, } *ss:*

I, Samuel B. McCulloch, clerk of the circuit court of Ohio county, West Virginia, do hereby certify that the foregoing is a true transcript of the record and papers in a cause lately pending in said court wherein the Chesapeake and Ohio Railway Company is complainant, and Joseph S. Miller, auditor of the State of West Virginia, is defendant.

Given under my hand, this 16th day of June, 1881.

SAMUEL B. McCOLLOCH, *Clerk.*

(Record printed July 13th, 1881.)

187 WEST VIRGINIA, *to wit:*

Pleas and proceedings before the supreme court of appeals at Wheeling, in Ohio county, on the 22d day of April, 1882:

Be it remembered that heretofore, to wit, at a supreme court of appeals held in Wheeling, in Ohio county, on the 17th day of June, 1881, the following order was entered:

This day came Joseph S. Miller, auditor of the State of West Virginia, by Robert White, Esq., his attorney, and presented a petition for an appeal from decrees of the circuit court of Ohio county, rendered, respectively, on the 2d day of May, 1881, and on the 6th day of June, 1881, in a cause in which the Chesapeake and Ohio Railway Company was complainant and the said petitioner was defendant, with a transcript of the record of the decrees aforesaid accompanying the petition, and a certificate of counsel practicing in this court that, in his opinion, the decrees complained of ought to be reviewed annexed thereto, which, being seen and inspected by the court, the appeal prayed for is allowed, and the same, being for the protection of the interest of the State, is to take effect

188 without bond and security being required.

A printed copy of the petition and transcript of record referred to in the foregoing order is hereto attached as part hereof.

The writ of appeal issued in pursuance of the foregoing order is in words and figures following, to wit:

The State of West Virginia to the sheriff of Kanawha county, Greeting:

We command you that you give notice to the Chesapeake and

Ohio Railway Company that it be before the judges of our supreme court of appeals, at Wheeling, on the first Monday in August next, then and there to have a rehearing of the whole matter contained in decrees rendered by the circuit court of Ohio county on the 2nd day of May, 1881, and on the 6th day of June, 1881, in a cause then therein pending, in which the Chesapeake and Ohio Railway Company was plaintiff, and Joseph S. Miller, auditor of the State of West Virginia, was defendant, which before us for cause of error in the same to be corrected on the petition of the said Joseph S. Miller, auditor as aforesaid, we have caused to come, and have then there this writ.

Witness O. S. Long, clerk of our said supreme court of appeals, this 17th day of June, 1881, and in the 18th year of the State.

O. S. LONG.

189 On the 28th day of June, 1881, the foregoing writ was returned to and filed in the office of the clerk of the supreme court of appeals, bearing upon it the following endorsement in writing: "Service accepted for appellee. W. H. Hogeman, att'y. June 25, 1881."

And at another day, to wit, at a supreme court of appeals held in Charleston, in Kanawha county, on the 28th day of January, 1882, the following order was entered:

Chesapeake and Ohio Railway Company, Plaintiff below, Appellee,

vs.

Joseph S. Miller, Auditor, &c., Defendant below, Appellant.

Upon an appeal from a decree of the circuit court of Ohio county, rendered on the 6th day of June, 1881.

For reasons appearing to the court, it is ordered that this cause be continued.

And on another day, to wit, at a special term of the supreme court of appeals, held in Wheeling, in Ohio county, on the 11th day of March, 1882, the following order was entered:

190 Chesapeake and Ohio Railway Company, Plaintiff below, Appellee,

vs.

Joseph S. Miller, Auditor, &c., Defendant below, Appellant.

Upon an appeal from a decree of the circuit court of Ohio county, rendered on the 6th day of June, 1881.

This day came the appellant, by the honorable C. C. Watts, attorney-general, and Robert White, Esq., attorney, and presented a written petition praying that "an early day of the present term be fixed for the hearing of this cause;" notice of the making of said petition having been accepted in writing by W. H. Hogeman, Esq., attorney for the appellee, who also in writing concurred in the prayer of said petition. Upon consideration whereof and for reasons appearing to the court the prayer of the said petition is granted, and this cause is set for hearing on next Wednesday, March 15th.

And on another day, to wit, at a special term of the supreme

court of appeals, continued and held in Wheeling, in the county of Ohio, on the 15th day of March, 1882, the following order was entered:

191 The Chesapeake and Ohio Railway Company, Plaintiff below, Appellee,

vs.

Joseph S. Miller, Auditor, &c., Defendant below, Appellant.

Upon an appeal from a decree of the circuit court of Ohio county, rendered on the 6th day of June, 1881.

This day came the appellant, by the Honorable C. C. Watts, attorney-general, and Robert White, Esq., his attorneys; and the appellee, by W. H. Hogeman and W. J. Robertson, Esqs., its attorneys, and this cause was partly heard upon the transcript of the record of the decree aforesaid and the arguments of counsel thereon, and is continued until to-morrow morning for further hearing.

And on another day, to wit, at a special term of the supreme court of appeals, continued and held in Wheeling, in Ohio county, on the 16th day of March, 1882, the following order was entered:

The Chesapeake and Ohio Railway Company, Plaintiff below, Appellee,

vs.

Joseph S. Miller, Auditor, &c., Defendant below, Appellant.

192 Upon an appeal from the circuit court of Ohio county, rendered on the 6th day of June, 1881.

This day came again the parties, by their attorneys, and this cause was further heard upon the transcript of the record of the decree aforesaid and the arguments of counsel thereon, and is continued until to-morrow morning for further hearing.

And on another day, to wit, at a special term of the supreme court of appeals, continued and held in Wheeling, in Ohio county, on the 17th day of March, 1882, the following order was entered:

The Chesapeake and Ohio Railway Company, Plaintiff below, Appellee,

vs.

Joseph S. Miller, Auditor, &c., Defendant below, Appellant.

Upon an appeal from a decree of the circuit court of Ohio county, rendered on the 6th day of June, 1881.

This day came again the parties, by their attorneys, and this cause was further heard upon the transcript of the record of the decree aforesaid and the arguments of counsel thereon, and is continued until to-morrow morning for further hearing.

193 And on another day, to wit, at a special term of the supreme court of appeals, continued and held in Wheeling, in the county of Ohio, on the 18th day of March, 2882, the following order was entered:

Chesapeake and Ohio Railway Company, Plaintiff below, Appellee,

vs.

Joseph S. Miller, Auditor, &c., Defendant below, Appellant.

Upon an appeal from a decree of the circuit court of Ohio county, rendered on the 6th day of June, 1881.

This day came again the parties, by their attorneys, and this cause was fully heard upon the transcript of the record of the decree aforesaid, and the arguments of counsel thereon; but the court not being advised of its judgment to be given, time is taken to consider thereof.

And now on this day, to wit, at a special term of the supreme court of appeals, continued and held in Wheeling, in Ohio county, on the 22d day of April, 1882, the day and year first hereinbefore mentioned, the following decree is rendered:

194 Chesapeake and Ohio Railway Company, Plaintiff below, Appellee,

vs.

Joseph S. Miller, Auditor of the State of West Virginia, Defendant below, Appellant.

Upon an appeal from a decree of the circuit court of Ohio county, rendered on the 6th day of June, 1881.

The court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is error in said decree. It is therefore adjudged, ordered, and decreed that the decree rendered in this cause by the circuit court of Ohio county on the 6th day of June, 1881, be, and the same is hereby, set aside, reversed, and annulled, and that the appellee do pay to the appellant his costs about the prosecution of his appeal in this court in this behalf expended. And this court proceeding to render such decree in this cause as the circuit court of Ohio county should have rendered, it is adjudged, ordered, and decreed that the injunction heretofore awarded in this cause be, and the same is hereby, dissolved, and the bill of the complainant is dismissed, and that the complainant do pay to the defendant his costs about
195 his defense in this behalf in the circuit court of Ohio county expended. Which is ordered to be certified to the circuit court of Ohio county.

The written opinion of the court, referred to in the foregoing decree, and filed with the record, is in words and figures following, to wit:

196 C. & O. Railway Co. *vs.* J. S. Miller, Auditor, &c.

Syllabus.

1. A court of equity has jurisdiction to enjoin the collection of an illegal tax, when such injunction will prevent a multiplicity of suits.

2. Although the State of West Virginia cannot be sued, yet an injunction will lie against the auditor of the State to restrain him from the performance of a mere ministerial duty.

3. When the text of a constitutional provision is plain and unambiguous, courts in giving construction thereto are not at liberty to search for its meaning outside the instrument itself.

4. The clear meaning of Sec. 1 of Article VIII of the constitution of 1863 is, that "*all* property, both real and personal, shall be taxed," except such as the Legislature may exempt under the exceptions contained in said section.

197 5. By said section of the constitution the Legislature was clearly inhibited from passing a law exempting the property of a railroad corporation from taxation.

6. The last clause of section 7 of the act of the Legislature, passed March 1st, 1866, which declares that "no taxation upon the property of said company shall be imposed by the State until the profits of said company shall amount to ten per cent. on the capital of said company," is unconstitutional and void.

JOHNSON, *Pres.*

The plaintiff, in Feb'y, 1880, filed its bill of injunction in the circuit court of Ohio county "to restrain Joseph S. Miller, auditor of the State of West Virginia, from adding to the amount of the taxes alleged to have been assessed upon the complainant's property ten per centum, or any other sum, and from certifying said alleged taxes, or any part thereof, to the sheriffs of the counties mentioned

198 in said auditor's statement, or any or either of said counties, for collection, or from doing anything whatever looking or tending to the collection of said taxes," &c. The bill of injunction had been presented to the Hon. Joseph Smith, judge of the seventh circuit, and the injunction by him granted; and the process issued thereon by the clerk of the circuit court of Ohio county, and bond as required having been given, the injunction was by the clerk endorsed upon the process.

The bill set out the legislation of the State of Virginia and of this State looking to the building of a railroad from tide-water to the Ohio river and the incorporation of the Chesapeake & Ohio Railroad Company, and set forth particularly the provisions of the act of the Legislature of West Virginia, dated March 1st, 1866, entitled "An act to incorporate the Covington & Ohio Railroad Company," the 7th section of which provided, among other things, that "*no taxation upon the property of the said company shall be imposed by the State until the profits of said company shall amount to ten per cent. on*

199 *the capital of said company*;" also the act of Feb'y 26th, 1867, entitled "An act to provide for the completion of a line or lines of railroad from the waters of the Cheapeake to the Ohio river," the second section of which act provided that "the companies which may consolidate under the provisions of this act shall constitute one corporation, which shall be vested with *all the rights, privileges, franchises, and property which may have been vested in either company prior to the act of consolidation*, and shall be known as the Chesapeake & Ohio Railroad Company."

The 14th sec. of the same act provides that the several companies therein mentioned, or either of them, might contract with the Cov-

ington & Ohio railroad commissioners for the construction of the railroad from Covington to the Ohio river; and in the event such contract should be made, the company so contracting should be known as the "Chesapeake & Ohio Railroad Company," and shall be entitled to all the benefits of the charter of the Covington
200 & Ohio Railroad Company, and to all the rights, interests, and privileges which by this act are conferred upon the "Chesapeake & Ohio Railroad Company when organized."

The bill alleges that such contract was made and was formally adopted by the Legislature of West Virginia, by an act passed Jan'y 26th, 1870, entitled "An act confirming and amending the charter of the Chesapeake & Ohio Railroad Company;" that the company was organized and the road completed. The bill further alleges that from time to time trust deeds or mortgages were executed upon the property of the said company, and recorded in the counties through which the road passed. The mortgages or deeds of trust are specified. It is further alleged that suits were instituted to foreclose these mortgages; that in said suits the said mortgages were foreclosed, and the sale of the railroad and all the property of the company was ordered, and said property was sold, and at the sale A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Junior,
201 and John Castru, styling themselves "a committee of purchase and reorganization, for themselves and others," became the purchasers thereof; which sale was confirmed, and a deed was, by a commissioner appointed for the purpose, ordered to be executed, and was duly executed, a copy of which is filed with the bill, which conveyance was duly executed and acknowledged by said Hatch and the others, the purchasers, who in said deed "declared that the name by which, by virtue of such conveyance and the statutes in such case made and provided, they should and would became a corporation, is and shall be the *Chesapeake & Ohio Railway Company.*"

The bill charges that, by virtue of the matters aforesaid, it, on the 1st day of July, 1878, (the date of said deed,) became and was, and has since continued to be and now is, a corporation by the name of the Chesapeake & Ohio Railway Company, *entitled to all the works, property, estate, rights, franchises, and privileges theretofore owned, used, and enjoyed by the Chesapeake & Ohio Railroad Company, in-*
202 *cluding therein the exemption from taxation on the property of said company* conferred by the contract by which the company was formed and organized," &c.

The bill alleges that the profits of the Chesapeake & Ohio Railroad Company, and of the Chesapeake & Ohio Railway Company have never, at any time, amounted to ten per cent. a year on its capital, and has never yet altogether amounted to ten per cent. on its capital.

The bill charges that Joseph S. Miller, auditor of the State of West Virginia, has made out and transmitted to the president of the complainant company a detailed statement of the amount of taxes claimed to be due for the year 1879 from the company for State, State school, county, and district purposes in the State, amount-

ing in the aggregate to $27,927.40, and has accompanied the same with a letter signed in his official capacity, dated December 10th, 1879, describing said statement as a statement of taxes assessed against the company for the year 1879, and stating in said letter that if payment was made at the treasury of the State on or
203 before the 20th day of Jan'y next thereafter 2½ per centum would be deducted; and, if not paid by that day, that it would be his duty to add ten per centum thereto, and certify to the proper officers for collection; that complainant is informed and believes that the said auditor bases his action on an act of the Legislature of West Virginia, passed Jan'y 31st, 1879, purporting to amend Sec. 7 of the act of March 1st, 1866, so as to repeal the exemption from taxation thereby granted. Complainant alleges that said act has never been agreed to by it, and is advised that in so far as it attempts to deprive complainant of the exemption aforesaid, it is null and void, and that the said auditor is not justified by it nor by any law of the State imposing taxes for the action done and threatened to be done by him; that said act, as well as all other acts which are designed or can be construed to impose taxes upon the property of the complainant in derogation of the exemption granted by said act of March 1st, 1866, is in violation of the provision of the Constitution of the United States which pro-
204 hibits a State from passing any law impairing the obligation of a contract.

The bill charges that unless the said auditor is restrained, he will certify the said taxes to the officers in the counties through which complainant's road passes, for collection; and to permit this would be unjust and oppressive, and would involve a multiplicity of suits to restrain the sheriffs from the collection of said taxes, &c., and would be in violation of complainant's chartered rights; and the bill concludes with the prayers for the injunction, which was granted.

The defendant, on the 11th day of May, 1880, demurred to the bill on these grounds: 1st, for want of equity; 2d, for want of proper parties; 3d, for want of jurisdiction. The demurrer was overruled, and the defendant answered. In his answer he insists "*that any act of the Legislature of West Virginia passed since it became a State which authorized or attempted to authorize or agree to the exemption of any property of a railroad company from taxation was unconstitutional,*
205 *null, and void.* And the said defendant further insists that if any act exempting the property of the Chesapeake & Ohio Railroad Company was constitutional, it was an immunity personal to said company, and was not by the sale of the said company's property and deed made to the purchaser passed to said company, and was not assignable and transferable, and did not pass to the Chesapeake & Ohio Railway Company, the complainant, and prayed that the injunction might be dissolved and the bill dismissed.

The case was finally heard on the 6th day of June, 1881, and the motion to dissolve the injunction was overruled and the injunction was perpetuated. From this decree the auditor appealed.

It is here argued that the court did not have jurisdiction of this cause. A court of equity has jurisdiction to enjoin the collection of

an illegal tax, when such injunction will prevent a multiplicity of suits.

Douglass *v.* Town of Harrisonville, 9 W. Va., 162.
Carothers *v.* B'd of Education, 16 W. Va., 541.

Although the State of W. Va. cannot be sued, yet an
206 injunction will lie against the auditor of the State to restrain him from the performance of a mere ministerial duty. The right to sue a State officer when the case cannot be sued, either to require or to inhibit the performance of a mere ministerial duty, has been repeatedly recognized.

Osborne *v.* Bank of the U. S., 9 Wheat., 738.
Davis *v.* Gray, 16 Wall., 203.
Board of Liquidation *v.* McComb, 2 Otto, 531.
Williamson *v.* Massie, 33 Gratt., 237.
State, &c., *v.* Governor, 5 Ohio St., 528.
Galloway *v.* Jenkins, 63 N. C., 147.
McDougal *v.* Romer, 2 Cal., 80.
Bryan *v.* Cathel, 15 Ia., 538.
Swann *v.* Burk, 40 Miss., 268.
Magruder *v.* Swann, 25 Md., 173.
Commonwealth *v.* Railroad Co., 53 Pa. St., 9.

It is otherwise where the duty to be performed is merely executive and political.

Slack *v.* Jacobs, 8 W. Va., 612.
Mississippi *v.* Johnson, 4 Wall., 475.

In this case the auditor, under the statute, was proceeding in the exercise of a mere ministerial duty; there was nothing whatever left to his discretion. The law required him, after the assess-
207 ment against the railroad corporations had been made, to notify them through their officers of the amount to be paid, and that if not paid within a time specified in the law to add 10 per cent. to the amount, and certify the taxes down to the proper officers for collection in the counties through which the road passed. To prevent a multiplicity of suits, the company had the right to test its liability to pay the taxes in one suit, restraining the auditor from the performance of the ministerial duty, without which the sheriffs in the counties, of course, could not proceed. It is much more convenient, both for the company and for the officers charged with the collection of the taxes, that it should be done in this way, and is much less injurious to the interests of the State, than to have a number of suits instituted for the purpose of arresting the collection of the taxes in the several counties. I think the court clearly had jurisdiction of the cause.

There is nothing in the objection that the proper parties are not before the court. It is claimed that the several counties
208 and districts through which the road passed ought to have been made defendants. We think not, in a case like this. All the taxes are imposed by State authority; and until the taxes are received by the auditor, or certified down to the proper officers

for collection, as we have seen, the auditor may be enjoined from certifying them down. The counties and districts have not such an interest in the suit as would make them necessary parties thereto. The auditor represents the interests of the State, and necessarily the interests of the counties and districts.

Again, this is simply a bill of injunction, and there is not as yet anything done or threatened by the counties and districts that would make them necessary parties to such a bill. If the complainant is liable to taxation or is not exempt from taxation under the law, then the injunction should have been dissolved; if otherwise, the injunction should have been made perpetual, and the decree of the circuit court is right. If the last clause of section 7 of the act of
209 March 1st, 1866, is unconstitutional, then the claim of the complainant, that it is exempt from taxation under a contract with the State, is without foundation, as it could in no court be allowed to shield itself under an unconstitutional law. If the law is unconstitutional, there could be no contract under it. But if under the said act and the subsequent acts and the sale and deed the company can take the immunity from taxation which the act of March 1st, 1866, attempted to give, and if the act is constitutional, then the plaintiff is exempt from the payment of all taxes in this State for the present.

The position of the learned counsel for the appellee, that unrestrained by constitutional inhibition the Legislature has the inherent power to exempt from taxation as well as to select the subjects of taxation, is undoubtedly correct. The power of exemption, as well as the power of taxation, unrestricted by constitutional provision, is one of the essential attributes of sovereignty.

City of Richmond *v.* Daniel, 14 Gratt., 387.
Home of the Friendless *v.* Rouse, 8 Wall., 438.
City of Richmond *v.* Railroad Co., 21 Gratt., 604.

210 Did the constitution of 1863, which was in force in this State when the act of March 1st, 1866, was passed, permit the exemption of the property of a railroad company from taxation? This question and the further question, If the act was constitutional, did the immunity from taxation pass under the sale and conveyance to the Chesapeake & Ohio Railway Company? have been elaborately argued by counsel on both sides, both orally and in writing, with learning and ability.

In approaching the decision of this question of constitutionality of the said act of the Legislature we are not unmindful of the rules that should govern us. These rules have been clearly and explicitly laid down in numerous decisions, and we feel their binding force. It is a well-settled rule that the meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it. The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it. But this intent is to be
211 found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to con-

vey that intent; and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. No change of public sentiment after the adoption of the constitution should have the slightest weight with the court to influence them to give a construction to the instrument not warranted by the intention of its framers. To be so influenced would justly subject the court or Legislature to the charge of reckless disregard of official oath and public duty; and if such course should become a precedent, these instruments would be of little avail. What a court is to do, therefore, *is to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require.

Cooley's Const. Lim., 54, and cases cited.

When the text is plain and unambiguous, courts are not at liberty to search for its meaning outside of the instrument itself. "To ascertain this meaning the first resort in all cases is to the
212 natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning."

Cooley's Const. Lim., 57.

In interpreting clauses of a constitution we must presume that words have been employed in their natural and ordinary meaning. Says Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat., 188: "The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense and to have understood what they meant." "This," says Judge Cooley, Const. Lim., p. 58, "is but saying that no forced or unnatural
213 construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is so often made by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held that it frequently becomes necessary to redeclare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart, upon which every man, learned and unlearned, may be able to trace the leading principles of government."

But if the clause to be construed is ambiguous or obscure, and leaves room for doubt as to what was really intended by it, then we may resort to other and extrinsic lights to aid us in giving it a correct interpretation; then and only then are we warranted in seeking elsewhere for aid. Where the text is obscure or ambiguous we

may look to the proceedings of the constitutional convention
214 which framed the instrument; Cooley Const. Lim., 66; but even in such case we must remember that as the constitution does not derive its force from the convention which framed it, but from the people who ratified it, says Judge Cooley, page 67, "the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding and ratified the instrument in the belief that that was the sense designed to be conveyed." Also in case of doubtful meaning in the words used we may look to contemporaneous and practical construction. "Contemporaneous construction may consist simply in the understanding with which the people received it at the time or in the acts done in putting it in operation, and which necessarily assumes that it is to be construed in a particular way. In the first case it can have very little force, because the evidence of the public understanding, when nothing has been done under the provision in ques-
215 tion, must always necessarily be vague and indecisive. But where there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausability and force which it is not easy to resist." Cooley Const. Lim., 67. Of this character was the question presented in Bridges *v.* Shallcross, 6 W. Va., 562, and the rules there laid down we approve.

In Bank of U. S. *v.* Halstead, 10 Wheat., 63, Mr. Justice Thompson said: "If any doubt existed whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, the practical construction given to it ought to have great weight in determining both questions."

Mr. Justice Johnson assigns a reason for this in the case of Ogden *v.* Saunders, 12 Wheat., 290, where he says: "Every candid mind will admit that this is a very different thing from contending that the frequent repetition of a wrong will create a right." The question in such case is, Has a wrong been committed? On page
216 70 of Cooley Const. Lim. the author criticizes the *ab convenienti* argument used by some courts, but says: It is believed, however, that in each of those cases an examination of the constitution left in the minds of the judges sufficient doubt on the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for however great a length of time cannot legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibitions before the mischief which the constitution was designed to guard against may appear, or before any one may be sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to

sanction a clear infraction of the constitution. We think we allow to contemporary and practical construction its full, legitimate
217 force where we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed."

But when doubts do arise in the minds of the court as to the interpretation to be put upon a provision of a constitution to be construed after a careful examination of the provision, and if, after all the lights to which it is proper to resort have been made use of for the purpose of ascertaining its true meaning, the court construing the provisions still has doubts whether the legislation complained of is an infraction of the instrument, the court, upon such doubt alone, is bound to pronounce in favor of the validity of the act. The court does not in such a case sustain the validity of the act because other persons or courts have doubted its constitutionality, but because the court itself, after using all the aids that it has a right to use, in its own mind, acting for itself and upon its own responsibility, is not able to say beyond a reasonable doubt that the act is unconstitutional. The presumption is in favor of the constitutionality of the act, and in a doubtful case that presumption is
218 suffered to sustain the act; for it must be remembered that "whoever derives power from the constitution to perform any public function is disloyal to that instrument and gravely derelict in duty if he does that which he is not reasonably satisfied the constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions. A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt; and if legislators do not act upon this principle, the reasons upon which are based the judicial decisions sustaining legislation in very many cases will cease to be of force." Cooley Const. Lim., 73.

In this cause contemporaneous and practical construction is earnestly insisted upon by counsel for appellee, and numerous acts of the Legislature passed since the act of March, 1866, in which the Legislature made similar exemption from taxation, as in the
219 said act of March 1st, 1866, are cited. And in this connection in the printed argument filed by the counsel it is said that one of the members of this court voted as a legislator for some of said acts. This is a mistake. But whether we are authorized to look at any of said acts, or to the proceedings of the constitutional convention of 1863 or 1872, to aid us in the decision of the question we are considering, depends upon the question whether to our minds there appears any obscurity or ambiguity in the constitutional provision to be construed.

The provision in question is section 1 of article VIII of the constitution of 1863. It is as follows:

"Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to

its value, to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious, or charitable purposes and public property may by law be exempted from taxation."

220 Before expressing an opinion upon the meaning of this language we will refer to some of the adjudicated cases construing constitutional provisions. The appellee relies upon two cases with confidence—Williamson *v.* Massie, auditor, 33 Gratt., 237, and State *v.* North, 27 Mo., 464, cited in the Virginia case by Anderson, judge. And it is insisted by counsel for appellee that "the provision that taxation shall be equal and uniform, and that all property shall be taxed according to its value, and that no one species of property shall be taxed higher than another, is not a grant to tax, for that right exists in the Legislature independently of the constitution, nor does it require the taxation of all property. It is simply a rule that is intended to prevent discrimination in the rate of taxation upon and the valuation of property that may be subjected to tax. In other words, it is a direction that all property that is taxed shall be taxed according to the rules there prescribed; but it leaves the Legislature untrammelled in its right to designate subjects of taxation."

221 It must be admitted that Judge Anderson's opinion, 33 Gratt., 237, *supra*, justifies this interpretation. He says as to the exception in the Virginia constitution: "Nor is it taken away or forbidden by section 3 of the same article of the constitution. That article does not forbid, but authorizes exemptions by the Legislature in certain specified cases, without forbidding it in others. The language is: 'The Legislature may exempt all property used exclusively for State, county, municipal, benevolent, and charitable purposes.' If it had intended to forbid its exempting other property it would have been easy to add the words, 'but no other,' and we think if its purpose had been to deprive the Legislature of a power, the exercise of which in cases that might arise might be so beneficial to the State, and the inhibition of which might be so hurtful, the above words, or their equivalent, would have been added."

The clause of the constitution of Virginia which Judge Anderson construed in the said case is section 1 of Art. X, which is as follows:

222 "Taxation, except as hereinafter provided, whether imposed by the State, county, or corporate bodies, shall be equal and uniform; and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

The second section prevents the taxing the privilege of taking oysters from their natural beds with tongs, but provides that the amount of sales of oysters so taken in any one year might be taxed at a rate not exceeding the rate of taxation imposed on any other species of property. Then follows the 3rd section, as above quoted: "The Legislature may exempt all property used exclusively for State,

county, municipal, benevolent, charitable, educational, and religious purposes."

Judge Anderson says, p. 241: "It was not intended to require the Legislature to tax all the property in the State and forbid its exercising its inherent power when necessary for the public interest and promotion of a sound public policy to exempt certain property from taxation, but only to prescribe a rule by which the Legislature should be guided in apportioning taxation; that all property taxed should be taxed according to its value; that it does not mean to take from the Legislature its important inherent power of exercising a discretion, when in its wisdom it may be deemed beneficial to the public, of exempting certain property from taxation, is more apparent when read in connection with the first clause in the sentence, which declares that taxation 'shall be equal and uniform,' and then follows the clause in question, separated from it only by a comma, 'and all property,' not only personal property or only real property, 'but all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.' Giving to the language of this section its proper signification, and to each member of the sentence its just influence and bearing in conveying the meaning of the whole, it was intended to require that taxation should be on the *ad valorem* principle, and that it should be equal and uniform; and it was no purpose of the framers of the constitution by this section to restrict the Legislature in the subjects of taxation, or to divest it of an important element of *of* sovereignty by an inflexible inhibition of exempting in any case property from taxation."

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In the case of State *v.* North, 27 Mo., 464, relied upon by Judge Anderson in his opinion, Judge Scott, who delivered the opinion of the court, said: "The 19th section of the bill of rights, which declares that all property subject to taxation in this State shall be taxed in proportion to its value, has been repeatedly construed by this court to mean, not that all the property in the State must be taxed, but that when any article of property is selected for taxation it shall be taxed according to its value, and not specifically; and the General Assembly may therefore not only lay an *ad valorem* tax on the goods of merchants, but may also impose a tax on their occupation, to be collected in the form of license."

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In Simmons *v.* The State, 12 Mo., 174, the court held: "The power of the General Assembly of this State to lay taxes for the purposes of revenue is a general primitive power coeval with the constitution and inseperable from the exercise of sovereignty. The only restrictions upon this power contained in the constitution of this State are 'that all property subject to taxation in this State shall be taxed in proportion to its value,' and that 'no tax shall be imposed on lands the property of the United States, nor shall lands belonging to persons residing out of the limits of this State ever be taxed higher than the lands belonging to persons residing within the State.'"

In Hamilton *et al. v.* St. Louis County Court, 15 Mo., 1, it was held that "the clause of the constitution declaring that 'all property subject to taxation in this State shall be taxed in proportion to its value' is evidently mandatory upon the General Assembly when exercising the taxing power, and furnishes a rule which is not to be departed from. What property shall be subjected to
226 *to* taxation is left to their discretion, but when they have selected the subjects the rule for assessing the tax is in proportion to the value of the property. * * * The idea of equality in taxation is certainly not the prominent idea conveyed by this clause; nor can we suppose that it was designed to be conveyed, when we consider that so many constitutions of other States previously adopted certain clauses expressly enjoining equality of taxation, and when the insertion of a word or two in the clause would have expressed the idea clearly. It may be further observed that if equality in taxation is required by this section, then the provision in the first section of the 10th art.—that the lands of non-residents shall never be taxed higher than the lands of our citizens—is entirely superfluous."

I shall have occasion to refer to these cases hereafter.

The 2d Sec., of the 10th Art. of the constitution of Ohio provides, "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money." Ranney, C. J., in speaking for the whole court of this provision of the constitution, in City, &c., *v.* Auditor, &c., 5 Ohio St., 589, said, "Before the adoption of the present constitution
227 the whole matter of taxation was committed to the discretion of the General Assembly. It might be levied upon such property and in such proportion as that body saw fit. The right to make exceptions and exemptions was unquestionable. But this discretion no longer exists. The public burdens are made to rest upon the property of the State; and whenever money is to be raised by taxation the positive injunction is, that laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money. Without express authority of law no tax, either for State, county, township, or corporation purposes can be levied; and we see no reason to doubt that this section of the constitution is equally applicable to, and furnishes the governing principle for, all laws authorizing taxes to be levied for either purpose. The great object of the provision was to secure equality and uniformity in the imposition of these public burdens."

228 So in Baker *v.* Cincinnati, 11 Ohio St., Gholson, judge, for the court, with reference to this same provision, said: "The anxiety was, that no property should escape its proper and equal burthen. * * * The things in contemplation were property of every possible description, and an equal and uniform tax upon that property according to its true value in money. The exemptions to be allowed from that tax are specially enumerated."

The California constitution provides: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law." This constitution has no provision that any property may by the Legislature be exempted from taxation, and the argument that certain exemptions were allowed could not be used to help a construction that it was not intended to take away the inherent powers of the Legislature to exempt property from taxation. In California it had been by the supreme court repeatedly held that under
229 this constitution the Legislature had no power to exempt property from taxation. In People *v.* Eddy, 43 Cal., 331, the court, by Rhodes, J., after referring to the former adjudications on the subject, and speaking of the legislation, the constitutionality of which was called in question, said: "If legislation of this character can be sustained, why may not exemption be extended until the whole burden of taxation is cast on one species of property? Debts secured by mortgages have now the benefit of the exemption, but by a change in the tone and temper of the Legislature they might be made to bear the whole burden of the taxes. It was not intended by the framers of the constitution that the Legislature, whether actuated by honest or corrupt motives, should have the power to exempt any kind of property from taxation. The exercise of the power would be dangerous. * * * It is impossible to conceive of any law which is more imperatively required by the principles of good government and the just rules of political economy to be equal and uniform than a revenue law. That the burden of taxation should rest equally upon all property within the State ought
230 to be axiomatic, not only in theory, but in practice. To enforce this rule, the constitution has provided, "That taxation shall be equal and uniform throughout the State." Is any argument needed in order to make it apparent that where the general law subjects all solvent debts to taxation, that another law which singles out one class of debts, whether the classification is based on the circumstance that their payment is secured by mortgages, or that they are owing to savings' banks, or to a particular bank, corporation, or person, or are owing by a particular person, whether natural or artificial, or a particular class of persons, and exempts such debts from taxation, is repugnant to the constitution?" The Illinois constitution provided that, "The General Assembly should provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property. The corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in re-
231 spect to persons and property within the jurisdiction of the body imposing the same." In Hunsaker *v.* Wright *et al.*, 30 Ill., 146, Walker, J., for the court, said: "These provisions were manifestly inserted in the fundamental law for the purpose of insuring equality in the levy and collection of the taxes to support the Government, whether levied for State, county, or municipal purposes. The design was to impose an equal proportion of those

burthens upon *all* persons within the limits of the disirict, or body imposing them." The constitution of Arkansas declared that "laws shall be passed taxing by a uniform rule all monies, credits, investments in bonds, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money; but burying-grounds, public school-houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, shall never be taxed; * * * but the General Assembly may exempt from taxation personal property to the value of five hundred dollars to each tax-payer." McClure, J. in Fletcher *v.* Oliver, 25 Ark., 289, after quoting the language of the constitution, said, "Under the former
232 constitution all laws that exempted property of the community from taxation received a strict construction, because all such laws are in derogation of equal rights. * * * Now, in the clause of the constitution first cited, it is declared that *all* real and personal property shall be taxed, subject, however, to the condition that the Legislature may exempt $500 to each tax-payer. * * * The declaration that *all* real property, except certain kinds held for charitable and public purposes, specifically enumerated, amounts to an inhibition on the Legislature from exempting other real property from taxation. Again, the constitution, in relation to personal property, limits the amount to $500 that may be exempted, which precludes the idea that any other or further exemption would be made. The imperative command of the constitution is that the Legislature shall tax by a uniform rule *all* property except that specifically enumerated as being exempt from tax by the express terms of the constitution. * * * 'Taxing by a uniform rule' means by one and the same unvarying standard; uniformity, not only in the *rate* of *taxation*, but uniformity in the *mode* of assessment by which the value is ascertained.
233 There must be an equality of burden. This uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform all over the State; if a county, township, city, town, or district tax, it must be uniform throughout the extent of territory to which it applies. The property within the legal sub-division, established by law for the convenience of the people, must all pay homage to this uniform rule." The Tennessee constitution of 1870 provides that all property, real, personal, or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientifiic, literary, or educational, and except one thousand dollars of personal property in the hands of each tax-payer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature
234 shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of

property of the same value. But the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct." This section of the constitution was by the supreme court of Tennessee held to mean that no property could in that State escape taxation, except such as was by the terms of the section permitted to be exempted. Railroad Companies *v.* Gaines, 7 Otto, 697, where we find the judgment of the supreme court of Tennessee was affirmed. In the brief of counsel for appellee our attention is particularly directed to this case, to show, say they, "the difference between that constitution and our own, and to show the inapplicability of the Tennessee cases on this subject relied on by counsel for the auditor." Let us see if there is any material difference in the meaning of the language used. The *first* clause of the section declares that all property, real, personal, and mixed, shall be taxed. The *second* provides for the exceptions
235 to the rule. The third provides that "all property shall be taxed according to its value." The *fourth* provides how that value is to be ascertained, to wit, as the Legislature may direct. The fifth, that taxes shall be equal and uniform throughout the State. The *sixth*, that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. The *seventh*, that the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct. The *first* clause of our section provides the same as the *sixth* of the Tennessee constitution, that taxation shall be equal and uniform throughout the State. The *second* the same as the *first* in the Tennessee, "all property, both real and personal, shall be taxed." The *third* the same as the *third* in the Tennessee, "all property shall be taxed according to its value." The *fourth*, the same as the *fourth* in the Tennessee constitution, provides how the value of the property is to be ascertained, to wit, as directed by law. The fifth, the same as the *sixth* in the Tennessee, provides that one species of property shall not be taxed higher than
236 another of equal value. The sixth corresponds to the *second* in the Tennessee, which provides for the exception to the general rule. The seventh and last in the Tennessee constitution is not in ours, and throws no light upon the subject we are considering. Here, then, we have five provisions in each of these sections substantially the same, only arranged differently in the sections, but in no manner, as we conceive, to make the common sense of the language different in the one case from the other. The exception is different as to subjects in some respects, but must have the same effect in the one case as the other upon the construction of the section. If one prohibits the Legislature from exempting property from taxation, that is not specifically excepted, we think the other does with equal clearness. It is also claimed by counsel for appelle, that the language used in the constitutions of Ohio and Arkansas, the construction of which we have noted, is essentially different in its force from that used in our constitution. Ours declares that "Taxation shall be equal and uniform throughout the State, and all

property, both real and personal, shall be taxed in proportion
237 to its value, to be ascertained as directed by law; * * *
property used for educational, &c., * * * purposes, and public property, may by law be exempted from taxation." The constitution of Ohio (and the Arkansas constitution is similar) provides that laws shall be passed taxing by a uniform rule all monies, &c., * * * and also all real and personal property according to its true value in money; but burying-grounds, &c., * * * may, by general laws, be exempted from taxation." What is the difference between saying that "taxation shall be uniform and *all* property, both real and personal, shall be taxed according to its value," and laws shall be passed taxing by a uniform rule *all* property, real and personal, according to its value? I confess I can see no difference in the meaning of the language. The prefix "Laws shall be passed taxing" certainly can make no difference, as we know that not a dollar of taxation could be levied without "laws being passed" requiring it to be done. And when our constitution used the language "Taxation shall be equal and uniform throughout the State, and *all* property
both real and personal, shall be taxed according to its value,
238 it was in fact saying that "laws shall be passed taxing *all* property, both real and personal, by an equal and uniform rule according to its value. It is claimed that our constitution only provides for equality, uniformity, and the *ad valorem* principle of taxation on the subject selected by the Legislature for taxation; do the Ohio and Arkansas constitutions do more? If the only effect of our constitution is to declare that taxation shall be on the *ad valorem* principle, the constitutions of those two States lay down no different rule, because the language is just as susceptible of that interpretation as is the language used in our own constitution. It is contended by counsel for appellee that the case of Hunsaker *v.* Wright, 30 Ill., 146, is a strong case in their favor, inasmuch as while the court held that exemptions generally were prohibited, this prohibition did not prevent exemptions as a matter of contract and for a consideration. I have carefully examined that case, and I can see no countenance given to such an idea. The language used is very similar to that employed in the Ohio and Arkansas
constitution. The court held that under that constitution
239 there could be no exemption from taxation for any cause whatever, whether for a consideration or not. The court, however, did hold that under the constitution, under previous decisions of the court, which were followed in that case, that the Legislature could commute the tax for an equivalent burthen. But if that decision is correct, the question has been elsewhere decided differently. It requires no argument to show that commutation of a tax for an *equivalent*, and an exemption from taxation are entirely different. The case of State *v.* North, 27 Mo., 464, and the cases that preceded it in the supreme court of Missouri, as we have shown, clearly shows that the idea of equality and uniformity in taxation were not contemplated by the Missouri constitution; that the declaration in that constitution that the lands of non-residents should not be taxed higher than the lands of residents of the State, in the ab-

sence of a single word in the instrument to show that taxation should be equal and uniform, showed that the Legislature had the right, except in the single instance named, to make such discriminations as it chose among the subjects of taxation. The lan-
240 guage in the Missouri constitution is, that "all property subject to taxation in this State shall be taxed in proportion to its value." Instead of being like the language in our constitution, it seems to me it is essentially different. The phrase, "subject to taxation," occurring where it does, might make it doubtful whether it referred to the single exception occurring in a different section, "no tax shall be imposed on lands the property of the United States," or to what the courts decided it did mean subjected to taxation by the Legislature." There certainly is nothing in the decisions that would amount to persuasive authority, that a declaration in a constitution that "all property, real and personal, shall be taxed in proportion to its value," means, and only means, that "such property as is by the Legislature selected for taxation shall be taxed in proportion to its value"; that the constitution was only designed to lay down a rule for the taxation of such subjects as should be selected to bear the burdens of the government, and that rule was the *ad valorem* principle. Yet the Missouri case is made the foundation of Judge Anderson's opinion to show that the provisions of the Virginia constitution, similar to ours, and essentially different
241 from the provisions of the Missouri constitution, were no inhibition on the Legislature to exempt what property it chose from taxation. Again, Judge Anderson, after coming to the conclusion that there is no doubt about the meaning of the text of the constitution, yet thought it necessary to further support his opinion by referring to the provisions of the Virginia constitution of 1850, and what was done under it. He says, page 243, "The constitution of 1850 contains the same provision, except as to county and corporate bodies, and other matters which do not effect this question. The language is, 'taxation shall be equal and uniform throughout the commonwealth, and all property other than slaves shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law.'" Under that constitution exemptions of property from taxation were frequently made, and I am not aware that the constitutionality of those exemptions has ever been even questioned, and they were sustained by judicial construction before the provision of the constitution of 1850 was copied into the present constitution of the State, and must be
242 held to have been adopted by the framers of the present constitution, as it had been understood by the unquestioned legislative construction and action, and the usage of the country, and by judicial construction before it was engrafted into the present Constitution. The Legislature, by the act — 1856, exempted the property of the Alexandria and Orange Railroad Company, in the city of Alexandria, from taxation, and in Alexandria & Orange R. R. Co. *vs.* City of Alexandria, 17 Grat., 176, this court held, that distinguished jurist, Judge Joynes, delivering the opinion, that whilst the property of the railroad company was exempt from

taxation by the State, it was not exempt from taxation by the city corporation, the court construing the exemption by the act of the General Assembly as limited to taxation by the State." An examination of the opinion of Judge Joynes will disclose the fact that he did not at all discuss the constitutionality of the act of the Legislature to which he was giving a judicial construction, and the constitutionality of the act in that case was not called in question, for the obvious reason, entirely overlooked by Judge Anderson, that by Sec. 23 of article 4 of the constitution of 1850, it
243 is provided in clear and explicit language, that "*other taxable property may be exempted from taxation by a majority vote of the whole number of members elected to each House of the General Assembly.*" We could not approve the opinion of Judge Anderson, were it the unanimous opinion of the court; but when we see that it was only the opinion of two of the members of the court out of four who sat in the case, and that one of the others dissented, and the fourth refused to express any opinion on the subject, not deeming it involved in the case; and looking, too, into the foundation upon which the opinion is based, it can have no influence whatever upon our minds. I have paid this much attention to the opinion only because it was so largely quoted from in the brief of the learned counsel for appellee, as well as earnestly relied upon in their elaborate oral arguments in the case. The case of the Commonwealth *v.* Chesapeake & Ohio Railroad Company, 27 Grat. 352, and 4 Otto, 718, can have no influence in the decision of this case, because the constitutionality of the act in question in that case was not raised or discussed.

Our attention has been called to Sec. 5 of Art. 8 of the con-
244 stitution of 1863. We have examined and considered this section, and conclude that it has no reference whatever to the subject of taxation. No authority to which we have been cited, or have found, sustains the constitutionality of so much of the 7th section of the act of March 1st, 1866, as exempts the property therein mentioned from taxation. Can there be any doubt that the said act is, to this extent, in violation of the constitution of 1863? The section of the constitution we have been considering declares, first, that "taxation shall be equal and uniform throughout the State." This is very strong language, and to say the least of it would prevent inequality and want of uniformity in taxing the subjects that the Legislature might declare should be taxed. But the *second* clause, "and *all* property, both real and personal, shall be taxed," certainly shows that it was the intent of the framers of the constitution to declare in most explicit terms, that *all* property in the State should bear its equal share of the burdens of the government, and that there should be no property exempted from taxation, unless it was specifically excepted in the constitution itself. The sense of the sentence requires that this language must be
245 considered a clause of the section, although only separated from the next clause by a comma. The third clause declares that taxation shall be on the *ad valorem* principle; all property, real and personal, shall be taxed: upon what principle? Shall be taxed in proportion to its value." How shall this value be ascertained?

The fourth clause gives the answer in clear language: "To be ascertained as directed by law." The fifth clause prevents any discrimination in taxing different species of property, and makes it more clear that taxation should be equal and uniform, and on the *ad valorem* principle, by declaring that "no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value." The words in this clause, "from which a tax may be collected," clearly refers to the fact that certain property may be exempted, as provided for in the sixth and last clause of the section which provides, "but property used for educational, literary, scientific, religious, or charitable purposes, and public property, may, by law, be exempted from taxation." This last clause is plainly an exception to a general rule. The
246 primary meaning of the word *but* is except, and that is manifestly the sense in which it is here used. As it appears in the section, to give it any other meaning would not make sense. The rule laid down is "that *all property*, both real and personal, shall be taxed," and the exception which "proves the rule" is that the Legislature might exempt from taxation certain property therein enumerated, but certainly would not have the authority to exempt any other property, even for a consideration. If the last clause of the section is not an exception to the *general rule laid down* "that *all* property, both real and personal, shall be taxed," then it has no force whatever, and is, as contended, mere surplusage. It cannot in any way be considered surplusage; it is not supposed that the framers of the constitution would use, and the people adopt, language that had no meaning. This is full of meaning. It permits the Legislature to *exempt* certain property from taxation, which, by the general rule, it would have been beyond their power to exempt, but for this important exception thereto. It occurs in the same section with the rule, and there cannot be the slightest doubt that it was intended as
247 an exception to it. In the Virginia constitution the exception is in a separate section. The language there used in the 3d Sec. is: "The Legislature may exempt," &c. This, I think, was clearly intended as an exception to the general rule laid down in the first section, which declares that "all property, both real and personal, shall be taxed in proportion to its value." Yet it is treated by Judge Anderson in his opinion, 33 Grat., 244, *supra*, as a grant of power, and not an exception to the general rule. It certainly could not properly be considered a grant of power, because, as we have already seen, the right of exemption is inherent in the Legislature, and remains, unless taken away by the constitution. But, as we have already seen, the exception in our constitution is contained in the section which proscribes the general rule, and that it must be regarded as an exception to the general rule, and nothing else, is clear. By the construction we have put upon this section of the constitution we give effect to every clause, every sentence, and every word contained therein. By the interpretation sough- to be put upon it by learned counsel of the appellee much of the section would be entirely meaningless. The language of the con-
248 stitution being clear and free from ambiguity, and the words

used having regard to their grammatical construction, embodying, as they do, a definite meaning which involves no absurdity, and no contradiction between different parts of the same instrument, that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed, and we are not at liberty to look outside of the instrument itself. If we did go outside, in the language of Mr. Justice Bronson, in People *v.* Purdy, *supra*, "in this way a solemn instrument—for so I think the constitution should be considered—is made to mean one thing by one man and something else by another, until in the end it is in danger of being rendered a dead letter; and that, too, when the language is so plain and explicit that it is impossible to mean more than one thing, unless we first lose sight of the instrument itself, and allow ourselves to roam at large in the boundless fields of speculation. For one, I dare not venture upon such a course. Written constitutions of government will soon come to be regarded as of little value if their injunctions may be thus lightly
249 overlooked; and the experiment of setting a boundary to power will prove a failure." As much respect as we have for the Legislature, a co-ordinate branch of the Government, we must pay greater respect to the sovereign will of the people expressed in the constitution which they have adopted for their own government; and where the court sees that the Legislature has plainly violated that instrument, it is the highest duty of the court, a duty which is inherent in the court, and plainly required by the written constitution, which is its sworn duty to support, to pronounce such act of the Legislature unconstitutional. We therefore do pronounce the last clause of Sec. 7 of the act of the Legislature passed March 1, 1866, which declares that "no taxation upon the property of the said company shall be imposed by the State until the profits of said company shall amount to ten per cent. on the capital of the company," clearly prohibited by section 1 of Art. VIII of the constitution of 1863, and therefore unconstitutional and void. Having arrived at this conclusion, it is immaterial to inquire whether the ap-
250 pellee, the Chesapeake and Ohio Railway Company, took the benefit of said act under the sale and conveyance to it; and so all other questions raised and not decided become immaterial. There was no contract made with any person or corporation by said last clause of Sec. 7 of the act of March 1, 1866, and of course no benefits under that clause of the section could pass to any one. The decree rendered in this cause on the 6th day of June, 1881, by the circuit court of Ohio county is reversed at the costs of the appellee, and this court proceeding to render such decree as said court should have rendered, the injunction granted in this cause on the 7th day of January, 1880, is wholly dissolved, and the complainant's bill is dismissed at its costs.

Judges Haymond and Green concurred in the opinion and syllabus.

251 I, O. S. Long, Clerk of the supreme court of appeals of West Virginia, hereby certify that the foregoing sixty-four

pages contain a full and complete transcript of the record of proceedings had in said supreme court of appeals in the cause of The Chesapeake and Ohio Railway Company *vs.* Joseph S. Miller, auditor, &c.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said supreme court of appeals, this 25th day of April, 1882, and in the 19th year of the State.

[SEAL.] O. S. LONG.

Clerk's fee for this transcript, $12.80.

252 UNITED STATES OF AMERICA:

To the Honorable the Chief Justice and associate justices of the Supreme Court of the United States:

And now comes the Chesapeake and Ohio Railway Company, by William J. Robertson and William H. Hogeman, its attorneys, and complains that in the record and proceedings, and also in the rendition of a decree in a suit between the Chesapeake and Ohio Railway Company, complainant, and Joseph S. Miller, auditor of the State of West Virginia, defendant, in the supreme court of appeals of West Virginia, being the highest court of the said State in which a decision could be had in said suit, and in which a final decree was rendered against it on the 22d day of April, 1882, in said suit wherein was drawn in question the validity of a statute and an authority exercised under the State of West Virginia, on the gound of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity; all of which appears in the record and proceedings in said suit, manifest error hath happened to the great damage of the Chesapeake and Ohio

253 Railway Company in this, that the said supreme court of appeals of West Virginia reversed, annulled, and set aside two decrees of the circuit court of Ohio county, West Virginia, mentioned in said decree of the 22d day of April, 1882, and in lieu thereof entered a decree in said suit dissolving an injunction theretofore granted in said suit, which injunction the auditor of West Virginia was inhibited, restrained, and enjoined, among other things, from certifying for collection certain taxes alleged to have been assessed upon the property of the Chesapeake and Ohio Railway Company in West Virginia, on the ground that the statutes under which said auditor was acting are repugnant to the Constitution of the United States in that they impair the obligation of a contract made between the States of West Virginia and Virginia and the Chesapeake and Ohio Railway Company, and to the benefit of which contract the Chesapeake and Ohio Railway Company is entitled.

Wherefore petitioner prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

CHESAPEAKE AND OHIO
RAILWAY COMPANY,
By WM. J. ROBERSTON,
WM. H. HOGEMAN, *Attorneys.*

Allowed. —— ——.

254 [Endorsed:] Chesapeake and Ohio Railway Co. *vs.* Joseph S. Miller, auditor of the State of West Virginia. Petition for writ of error.

255 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph S. Miller, auditor of the State of West Virginia, appellant, and The Chesapeake & Ohio Railway Company, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of,
256 or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said appellee, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by M. R. WAITE,
Chief Justice of the United States.

April 28, 1882.

257 [Endorsed:] I, O. S. Long, clerk of the supreme court of appeals of West Virginia, do certify that the within writ of

error was received by me on this 29th day of April, 1882, and that at the same time a copy thereof was lodged in my office for Joseph S. Miller, auditor of the State of West Virginia. O. S. Long.

258 The United States of America to Joseph S. Miller, auditor of the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of West Virginia, wherein The Chesapeake & Ohio Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

M. R. WAITE,
Chief Justice of the United States.

259 Endorsed: I acknowledge service on me of a copy of the within citation, on this 29 day of April, 1882. Jos. S. Miller, auditor of the State of West Virginia. I, O. S. Long, clerk of the supreme court of appeals of West Virginia, do certify that the within citation, with the evidence of service thereon endorsed, was filed in my office on this 29th day of April, 1882. O. S. Long.

260 Know all men by these presents, that we, the Chesapeake and Ohio Railway Company, principal, and C. P. Huntington, surety, are held and firmly bound unto Joseph S. Miller, auditor of the State of West Virginia, in the full and just sum of sixty thousand dollars, to be paid to the said Joseph S. Miller, auditor of the State of West Virginia, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately at a supreme court of appeals in and for the State of West Virginia, in a suit depending in said court between the Chesapeake and Ohio Railway Company, complainant and appellee, and Joseph S. Miller, auditor of the State of West Virginia, defendant and appellant, a final decree was rendered against the said the Chesapeake and Ohio Railway Company, and the said the Chesapeake and Ohio Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Joseph S. Miller, auditor of the State of West Vir-
261 ginia, citing and admonishing him to be and appear at a Su-

preme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said the Chesapeake and Ohio Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to to remain in full force and virtue.

[SEAL.] THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

By C. P. HUNTINGTON, *P't.* [SEAL.]

EDW'D T. TOURNIER, [SEAL.]
Secretary.

C. P. HUNTINGTON. [SEAL.]

Approved by—

M. R. WAITE,
Chief Justice of the United States.

April 28, 1882.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, George F. Betts, a commissioner of the circuit court of the United States in and for the southern district of New York, do hereby certify that C. P. Huntington, president of the Chesapeake and Ohio Railway Company, and Edward F. Tournier, secretary of the same company, whose names are signed to the foregoing writing or instrument bearing date on the twenty-seventh day of
262 April, 1882, as such president and secretary, have personally appeared and acknowledged the same before me in my said district; and I do certify that they, the said C. P. Huntington and Edward T. Tournier, also severally acknowledged to me that they executed the same as the act and deed of the said the Chesapeake and Ohio Railway Company; and they, being by me duly sworn, did each depose and say that he, the said C. P. Huntington, resides in the city of New York, in the county of New York, and State of New York, and is the president of the said railway company; and he, the said Edward T. Tournier, resides in the town of Greenburg, county of Westchester, and State of New York, and is the secretary of said railway company; that he knew the corporate seal of said railway company; that the seal affixed to the said writing or instrument was such corporate seal; that it was so affixed by authority of the said railway company, and that they severally signed their names thereto, by the like authority, as president and secretary of said company, respectively.

And I do further certify that C. P. Huntington, whose name is signed to the writing or instrument above, bearing date the 27th day of April, 1882, acknowledged the said writing to be his act and deed, in my district aforesaid.

263 Witness my hand, this 27th day of April, 1882.

GEO. T. BETTS,
U. S. Commissioner of the Southern District of New York.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

C. P. Huntington, surety in the foregoing bond, dated April 27, 1882, being duly sworn, says that he is a resident of the State of New York, and is worth the amount or sum of one hundred and twenty thousand dollars over all his debts and liabilities, exclusive of property exempt from execution.

C. P. HUNTINGTON.

Sworn to before me, the 27th day of April, 1882, in the district aforesaid.

GEO. T. BETTS,
U. S. Commissioner for the Southern District of New York.

I, O. S. Long, clerk of the supreme court of appeals of West Virginia, do certify that the foregoing bond, certificates, and affidavits were filed in my office on the 29th day of April, 1882.

O. S. LONG.

A true copy. Attest: O. S. LONG, *Cl'k.*

264 [Endorsed:] Chesapeake & Ohio Railway Company *ag'st* Joseph S. Miller, auditor of the State of West Virginia. Copy of bond.

Endorsed on cover: West Virginia supreme court of appeals. No. 203. The Chesapeake and Ohio Railway Company, plaintiff in error, *vs.* Joseph S. Miller, auditor of the State of West Virginia. Filed 5th May, 1882.

114-176

FILED
JAN 28 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM 1884.

No. 203.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN S. MILLER, Auditor of the State of West Virginia,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM H. HOGEMAN,
WILLIAM J. ROBERTSON, and
GEO. F. EDMUNDS,
Of Counsel.

THOMAS McGILL & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term 1884.—No. 203.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH S. MILLER, AUDITOR OF THE STATE OF WEST VIRGINIA, DEFENDANT IN ERROR.

In Error to the Supreme Court of Appeals of the State of West Virginia.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error, under section 709 of the Revised Statutes, to a final decree of the Supreme Court of Appeals of West Virginia, which was entered on April 22d, 1882, whereby said Supreme Court of Appeals reversed a decree entered by the Circuit Court of Ohio County, West Virginia, on June 6th, 1881, perpetuating an injunction which had been allowed the Chesapeake and Ohio Railway Company on January 7th, 1880, by Hon. Joseph Smith, judge of the 7th judicial circuit of said State, restraining Joseph S. Miller, as auditor of the said State, from adding certain penalties to certain alleged taxes described in the record, which the auditor had notified said company had been

assessed upon its property in said State, and of which he had demanded payment; which injunction also restrained the said auditor from certifying such taxes to the sheriffs of the counties mentioned in a statement which accompanied the notice of the auditor, for collection or for any other purpose, and from doing anything whatever looking or tending to the collection of such taxes from said company or out of its property; and whereby also said Supreme Court of Appeals, in place of the decree so reversed, entered a decree dissolving the injunction and dismissing the bill on which such injunction had been awarded. The right to the injunction was based on a provision of the charter of the Chesapeake and Ohio Railway Company, which is found in section 7 of chapter 131 of the Acts of the Legislature of West Virginia, passed March 1st, 1866, entitled "An act to incorporate the Covington and Ohio Railroad Company."

The section is as follows [Appendix, p. 37]:

"The rate of charge by said company for passengers and freight transported on the main line and branches of said railroad shall never exceed the highest allowed by law to other railroads in the State, and no discrimination shall be made in such charges against any connecting railroad or canal company chartered by the State, *and no taxation upon the property of the said company shall be imposed by the State until the profits of said company shall amount to ten per cent. on the capital of the company.*"

The plaintiff in error claimed the benefit of this provision under these circumstances. By the act in which this provision is found, and by a concurrent act of the General Assembly of Virginia passed March 1st, 1866, [Appendix, p. 64,] a plan was devised by the States of Virginia and West Virginia for the formation of a company to build and operate a railroad from Covington, in Virginia, to a point on the Ohio river in West Virginia, which company was to be known as the Covington and Ohio Railroad Company." By these acts

commissioners were designated and appointed on behalf of the two States to contract with capitalists for the formation of such company, and by the contract to confer on the company which might be formed all the benefits of the said acts. Although efforts were made by the commissioners under these acts to secure the formation of a company as contemplated, these efforts were unsuccessful. Thereupon, in 1867, the Legislature of West Virginia and the General Assembly of Virginia by concurrent acts, each entitled "An act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river," [Appendix, pp. 38, 67,] provided that it should be lawful for the company which might be organized under the acts of 1866, above mentioned, to consolidate with certain designated railroad companies already organized and in operation; and that "the companies which may consolidate under the provisions of this act shall constitute one corporation, which shall be vested with all the rights, privileges, franchises, and property which may have been vested in either company prior to the act of consolidation, and shall be known as the *Chesapeake and Ohio Railroad Company.*" These acts of 1867 contained numerous additional provisions respecting the rights of said company so to be formed, including therein the right to borrow money and to execute liens upon its property and revenues to secure the payment of the interest and principal of the same; also the right to acquire, by purchase or in payment of subscriptions of stock, not exceeding five millions of acres of land.

In case the scheme of the acts of 1866 should fail, and a distinct corporation, to be known and operated as the "Covington and Ohio Railroad Company," should not come into existence under them, and in case no such consolidated corporation as the acts of 1867 contemplated should come into existence, an alternative scheme for securing the building and operation of a railroad from Covington, in Virginia, to the Ohio river, in West Virginia, was provided by the

acts of 1867. This scheme is found in section 14 of chapter 93 of the act of the Legislature of West Virginia passed February 26th, 1867, and is as follows [Appendix, p. 41]:

"The Virginia Central Railroad Company and the West Virginia Central Railway Company, or either of them, may contract with the Covington and Ohio Railroad Commissioners for the construction of the railroad from Covington to the Ohio river; and in the event such contract be made, the said Virginia Central Railroad Company or the West Virginia Central Railway Company shall be known as the *Chesapeake and Ohio Railroad Company, and shall be entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests, and privileges which by this act are conferred upon the Chesapeake and Ohio Railroad Company when organized.*"

No "Covington and Ohio Railroad Company" was formed under the acts of 1866; nor was any consolidation effected as contemplated under one scheme of the acts of 1867; but on August 31st, 1868, the commissioners designated and appointed in the acts of 1867, under the authority of the section last quoted, entered into a written contract with the Virginia Central Railroad Company by which that company agreed and undertook to construct, equip, and operate the railroad from Covington to the Ohio river, and by which it was declared and certified that the Virginia Central Railroad Company should thereafter be known as "The Chesapeake and Ohio Railroad Company," and be entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests and privileges which, by the statutes aforesaid, are conferred upon the Chesapeake and Ohio Railroad Company, when organized. This contract was formally approved, ratified, and confirmed by an act of the Legislature of West Virginia passed January 26th, 1870, [Appendix, p. 42,] and under it the Chesapeake and Ohio Railroad Company was formed and became entitled to the exemption from taxation

already mentioned. The record discloses the fact that after the formation of the Chesapeake and Ohio Railroad Company it executed and delivered sundry mortgages or deeds of trust on all its works, property, rights, franchises, and privileges to secure numerous bonds issued by said company; that in the course of time it made default in the interest due on such bonds, and that thereupon due and proper proceedings were taken and had, in courts of competent jurisdiction, in Virginia and West Virginia, to foreclose said mortgages or deeds of trust, and to sell the mortgaged premises, and that under such proceedings there was sold, and on July 1st, 1878, there was duly conveyed, by Williams C. Wickham, special commissioner authorized thereto, to A. S. Hatch, C P. Huntington, A. A. Low, Isaac Davenport, jr., and John Castree, who thereupon became, under the laws, a corporation by the name of "*The Chesapeake and Ohio Railway Company*," all the works, property, estate, rights, franchises, and privileges of the Chesapeake and Ohio Railroad Company. The statutes authorizing these proceedings and declaring the effect of the conveyance thereunder are sections 28, 29, 30, and 31 of the Code of Virginia, edition of 1860, [Appendix, p. 48,] and chapter 70 of the Acts of the Legislature of West Virginia passed February 18th, 1871, [Appendix, p. 49,] and chapter 12 of the Acts of the Legislature of West Virginia passed February 20th, 1877. [Appendix, p. 51.] They provide that "the corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights, and privileges, and perform all such duties, as would have been had or should have been performed by the first company but for such sale and conveyance," &c.

Under these proceedings in foreclosure, and under the conveyance of Commissioner Wickham, and under the statutes which have been referred to, the plaintiff in error claimed that it had succeeded, and was entitled to, the ben-

acts of 1867. This scheme is found in section 14 of chapter 93 of the act of the Legislature of West Virginia passed February 26th, 1867, and is as follows [Appendix, p. 41]:

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Under these proceedings in foreclosure, and under the conveyance of Commissioner Wickham, and under the statutes which have been referred to, the plaintiff in error claimed that it had succeeded, and was entitled to, the ben-

efit of the immunity and exemption from taxation contained in the act of 1866; and averred and proved that the aggregate profits of the Chesapeake and Ohio Railroad Company and of the complainant company, the plaintiff in error, from the formation of the Chesapeake and Ohio Railroad Company up to the institution of the suit, did not amount to ten per cent. on the capital of the Chesapeake and Ohio Railroad Company, or of the complainant company. The taxes alleged to have been assessed against it, and of which payment was demanded by the auditor, were all imposed on the property of the plaintiff in error by the State of West Virginia, through its auditor, for the year 1879, and amount in the aggregate to $27,927.40. Of this sum, $5,026.62 was for State and State school purposes, $12,172.24 was for county purposes, and $10,728.54 for district purposes.

All of these matters are set out with much more fullness and detail in the bill of complaint; and, in addition, it is therein alleged that, notwithstanding them, Joseph S. Miller, auditor of West Virginia, threatened to, and unless restrained would, add certain statutory penalties to such taxes if not paid by a day named, and, with such penalties added, would send such taxes to the sheriffs of certain specified counties for collection, if need be, by distraining and selling the property of the plaintiff in error until a sufficient sum should be realized to pay such taxes.

The bill of complaint contains a further averment to the effect that the auditor based his action in the matter on an act of the Legislature of West Virginia passed January 31st, 1879, [Appendix, p. 47,] purporting to amend section 7 of the act of March 1st, 1866, so as to repeal so much thereof as confers the exemption from taxation, and adds:

"But complainant avers that said act of 31st January, 1879, has never been accepted or agreed to by it, and is advised that in so far as it attempts to deprive complainant of

the benefit of the exemption aforesaid it is null and void, and that said auditor is not justified by it nor by any law of the State of West Virginia imposing taxes for the action done and threatened to be done by him; said act, as well as all other acts which were designed or can be construed to impose taxes upon the property of complainant in derogation of the exemption granted by said act of 1st March, 1866, being in violation of the provision of the Constitution of the United States which forbids any State from passing any law impairing the obligation of contracts."

To this bill the defendant demurred, and the demurrer having been argued and considered, the Circuit Court of Ohio county, on May 2d, 1881, overruled the same. The defendant thereupon answered, setting up sundry matters of defense, of which the only one decided by the Supreme Court of Appeals adversely to the plaintiff in error was, that the exemption contained in the act of 1866 [Appendix, p. 3] was not authorized by the Constitution of West Virginia, and was, therefore, null and void.

On June 6th, 1881, the Circuit Court of Ohio county, on considering the bill, answer, replication, and proofs, entered a final decree, whereby it refused to dissolve the injunction, and made the same perpetual. From this decree the auditor appealed to the Supreme Court of Appeals of West Virginia, and, as already stated, on April 22d, 1882, that court reversed the decree of June 6th, 1881, and entered a decree dissolving the injunction and dismissing the bill on the sole ground that the exemption granted by the act of 1866 was not authorized under the Constitution, and was, therefore, null and void.

Assignment of Error.

The plaintiff in error assigns as error this action of the Supreme Court of Appeals of West Virginia, and respectfully insists—

1. That the exemption contained in the act of 1866 is not prohibited by or repugnant to the Constitution of West

Virginia, and so is a valid provision of the act of March 1st, 1866.

2. That even if said contract or exemption, taken alone and in the absence of any contemporaneous construction, could have been held repugnant to the Constitution, it was error not to hold that, upon the facts and history stated in the record, the contract of the Legislature and its agents was binding on the State, and was impaired by the law of 1879, which attempted to repeal the Contract Act of 1866, and, in effect, imposed taxation upon the property of the company.

3. That the court held and adjudged that the plaintiff in error was liable for the county, district, and municipal taxes mentioned in the record.

Points of Law.

In discussing this proposition, we are not unmindful of the fact that as a general rule the construction given by State courts to State laws and Constitutions are followed by the Federal courts; but this rule does not extend to cases in which the Supreme Court of the United States is called on to interpret or to enforce the obligation of the contracts of States, whether such contracts have been made in the form of laws or by representatives of the State in pursuance of State laws. In this respect it has been held that fidelity to the Constitution of the United States makes it necessary that in such a matter the Supreme Court of the United States should not follow the construction of a State court with whose opinion it cannot concur, and it makes no difference in the obligation whether the contract is in the shape of a law or of a covenant of the State's agents. Were this otherwise, one of the most important objects of the law under which this writ of error is brought would be rendered utterly valueless.

Burgess *v.* Seligman, 107 U. S., 20, 33, 34, and cases cited.

Carroll County *v.* Smith, 111 U. S., 556, 562.

We think there can be no doubt that in this case this court will exercise its own judgment of the true meaning of the State Constitution, without regard to the construction now, for the first time, placed thereon by the State court.

The provision of the Constitution of West Virginia which it is claimed prohibits the exemption from taxation is found in section 1 of article 8 of the Constitution of West Virginia adopted in 1863, and is as follows:

"Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law, No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious, or charitable purposes, and public property, may, by law, be exempted from taxation."

It was contended by the defendant in error, and it was held in this case by the Supreme Court of Appeals of West Virginia, that this provision amounts to a mandate to tax all property in the State except only such as is thereby expressly permitted to be exempted from taxation, and that the property of the plaintiff in error is not of the character permitted to be exempted.

On the other hand, it is contended by the plaintiff in error, and it insists, that from the adoption of the Constitution of 1863 until the decision now complained of it has been the practical construction of this provision, and of a provision substantially identical therewith, found in the Constitution of West Virginia adopted in 1872, [Appendix, p. 3,] that the Legislature had the power to exempt other property than that named.

It is to be remembered that the first Constitution of West Virginia was adopted in 1863. In the same year the first Legislature of the State assembled for the purpose

of enacting all needful legislation for the new State. It was of course necessary to provide adequate means for raising revenue with which to meet the expenses of the State and of all counties and other subdivisions of the State. Accordingly, this Legislature, which assembled on the 20th of June, 1863, being the first one after the adoption of the Constitution, and which was made up in part of gentlemen who had been members of the convention that framed it, enacted a law providing for the assessment of taxes upon the property in the State. This law was very comprehensive, and put in operation a very effective method of raising revenue. But among its provisions is one declaring what property shall be exempt from taxation. This provision, so far as it need be quoted, is as follows [Appendix, pp 5, 6:

"All personal property described in this section, and to the extent herein limited, shall be exempt from taxation; that is to say, * * * all agricultural productions grown directly from the soil, and the natural increase in number and the products of live stock during the year previous to the 1st day of February in any year, when such products remain unsold in the possession of the producer on the said 1st day of February; and all manufactured articles and products of mechanical skill or labor produced in this State during the year previous to the said 1st day of February, and remaining unsold in the hands of the producer on that day."

This enactment of the Legislature, at the time and under the circumstances, is significant, and indicates in the clearest possible manner that under the construction placed upon the Constitution by the legislative department of the State government the Legislature was unrestrained, in respect to the subjects of exemption, by anything contained in the Constitution.

This law was amended and re-enacted by the Legislature of 1868, [Appendix, p. 6;] and although other sections

were materially changed, this section was re-enacted precisely as it had been enacted in 1863.

Subsequently, in 1868, [Appendix, p. 7,] there was a complete revision and codification of the laws of West Virginia by the Legislature, including the law relating to the assessment of taxes, and at that time this section was rearranged and re-enacted. But so far from reducing the subjects of exemption, all those already provided for were continued, and others were added. Among those added, were "the products during the same time of mines, salt wells, and oil wells within this State remaining unsold in the hands of the producer or his agent on the 1st day of April."

The extent of this addition is a matter of no small importance, when it is remembered that the mines and oil and salt wells constituted at that time the most important elements in the business of West Virginia. In 1875 [Appendix, p. 74] this law was amended, but the section under consideration was re-enacted precisely as it was in the Code of 1868.

In 1879 [Appendix, pp. 27 to 33, and 61] the law relating to assessment of taxes was again amended. And although in his message to the Legislature the Governor of the State, for the first time in its history, called special attention to the section designating the subjects of exemption, and claimed that this section was in conflict with the Constitution then in force, which Constitution was adopted in 1872, and on this subject is practically identical with the Constitution of 1863, and urged that it should be amended and made to conform to the Constitution, the Legislature re-enacted the section and continued therein every subject of exemption contained in the section as it appears in the Code of 1868. But whilst continuing these exemptions, the Legislature, in 1879, of its own accord, attempted, by an act which no one has attempted to vindicate, to deprive the plaintiff in

error of the benefit of the exemption contained in its charter, by re-enacting the section containing it with such exemption omitted therefrom.

This law was again amended in 1881, [Appendix, p. 33,] but without changing this section. As thus amended, the law is in full force in the State at this time.

In this connection it is proper to observe that in 1872 a new Constitution was formulated by a convention called for that purpose. That convention rejected a proposition [Appendix, p. 34] which would clearly have required the taxation of all property not specifically exempted by the Constitution, and in its stead adopted the provision under consideration from the Constitution of 1863. As that provision had received a uniform practical construction from 1863 up to that time, and was a matter of the most public notoriety, it is reasonable to presume that it was adopted by the convention and by the people in 1872 with the construction that had thus been placed upon it.

Bridges *v.* Shallcross, 6 West Va., 586; Leavenworth *v.* Miller, 7 Kansas, 480.

And that it has been so understood since is manifest from the fact that no Legislature that has assembled has, in the only way in which a Legislature can construe a constitutional provision, placed any other construction upon it.

In addition to the construction thus placed upon the Constitution of 1863, [Appendix, p. 5,] the Legislatures which assembled thereunder have asserted this construction by other enactments. For instance, the property of railroad companies has always, in West Virginia, been assessed under provisions which were peculiarly applicable to such companies. The first provision on this subject was enacted in 1863, and in general terms required certain officers of the company to return for assessment all the property of the company, with this qualification: "The property ex-

empt from taxation by the charter of any such company shall not be assessed."

This provision was amended in the Code of 1868, [Appendix, p. 8,] and again under the Constitution of 1872, [Appendix, p. 12,] by the Legislatures of 1875 and 1877, and twice in 1879; and in each of these enactments, except those of 1879, [Appendix, p. 17,] it is provided that "the property exempt from taxation by the charter of any such company, or otherwise, shall not be assessed." This was omitted from the acts of 1879 because the Legislature of that year had attempted to deprive the plaintiff in error of the benefit of the privilege contained in its charter, and then for the first time to place its property on the lists for taxation. But the several Legislatures which acted under the Constitution gave numerous other evidences of their construction of this provision of the Constitution. The fact is, every Legislature that ever sat in the State, from its formation to this date, under the Constitutions of 1863 and 1872, has placed its construction of the provision under consideration on its enactments in unmistakable terms; and these are throughout perfectly harmonious and consistent, and assert the unrestricted power of the Legislature to select the subjects of exemption. This was done by the Legislatures of 1866, 1867, 1868, 1869, 1870, 1871, and 1872, [Appendix, p. 51, &c,] by providing, in special charters granted in those years to railroad and other improvement companies, that the property of such companies should enjoy immunity from taxation. This would doubtless have been continued after 1872 but for the fact that, under the Constitution of 1872, charters for these purposes could only be obtained under general laws.

In the Legislature of 1877 an effort was made to subject the property of the Chesapeake and Ohio Railroad Company to taxation, but it failed, evidently because the immunity from taxation enjoyed by the company was considered a valid feature of its charter.

And it is a fact deserving special consideration that there has been a session of the West Virginia Legislature since the decision of this case by the Supreme Court of Appeals of West Virginia. And although that decision, and its effect upon that portion of the assessment law which relates to exemptions, was brought specially to its attention, and an effort made to make the law respecting exemptions conform to the decision in this case, that Legislature refused to accept such decision, and refused to make any change in the law in that respect, although it amended other sections of the same law. [Appendix, p. 76; Acts West Va., 1883, Ch. 52, p. 73.]

Perhaps one of the most striking instances of the exercise of this power of exemption by the Legislature under the Constitution of 1863 is found in chapter 56 of the acts of 1866, [Appendix, p, 75,] which is entitled "An act to dispense with the assessment of back taxes in certain counties." Under that act, all persons and property were released from all liability for the taxes for the years 1861 to 1864, both inclusive, in all counties where the same had not been assessed, or, having been assessed, where the assessment of the same had not been returned to the auditor's office; provided only, that the lands of non-residents were not thereby exempted from taxation. The effect of this act was to relieve the residents of quite a number of counties in the State from all taxation. This act was referred to by the Supreme Court of Appeals of West Virginia in the case of White Sulphur Springs Company *v.* Robinson, decided in 1869, and reported in 3 W. Va. Reports, p. 547, in which that court held that while the courts were powerless to aid the appellant, the Legislature, under the same power which justified the passage of that act, could afford all the relief desired, and the appellant was therefore recommended to apply to the Legislature.

Added to these numerous instances of the construction placed upon the provision of the Constitution under con-

sideration by the legislative department is the construction placed thereon by the executive department.

As will be seen by reference to the acts relating to the assessment of the property of railroad companies, this assessment has, since 1868, been imposed through the auditor, an office of the executive department of the State. This department made no attempt to assess the railroad of the plaintiff in error until the year 1879, when the taxes involved in this suit were imposed. Until that time the validity of the exemption claimed by the plaintiff in error was acquiesced in and was fully recognized and respected. But, furthermore, it has already been shown that under the Constitution of 1872 there have been sundry enactments by the several Legislatures which have been in session thereunder, which indicate clearly the construction placed by the Legislature on the Constitution. Under that Constitution all acts are submitted to the Governor for approval before they take effect, and power is conferred on the Governor to return to the Legislature any act which he does not approve, because it may be repugnant to the Constitution, or for any other reason; and when thus returned the act becomes subject to further action by the Legislature. It is a noteworthy fact that all acts such as are here referred to were approved by the respective Governors who served when such acts were enacted, and thus we have the assent of the Chief Executive to their constitutionality, and his concurrence in the assertion by the Legislature of its power to enact them.

As we have already seen, the Supreme Court of Appeals of West Virginia, in White Sulphur Springs Co. *v.* Robinson, 3 West Va., 547, admitted the power of the Legislature under the Constitution of 1863 to exempt and relieve the people and the property of residents of whole counties from all taxation for a series of years. This power, of course, implied the power to exempt less than counties when the Legislature deemed it advisable.

The power thus admitted has never been questioned by the courts in West Virginia, until in this case three appellate judges overruled two circuit judges.

And in Douglass *v.* Town of Harrisville, 9 West Va., 165, the Supreme Court of Appeals distinctly decided that the provisions of the Constitution of 1863 in respect to taxation did not apply to any but taxes for State purposes, and that the Legislature under that Constitution had plenary power in respect to taxes for county, district, and municipal purposes, which represent four-fifths of the taxes involved in this suit.

In the case of Township of Pine Grove *v.* Tallcott, 19 Wall., 677, in which this court upheld the validity of certain State laws, notwithstanding such laws had been declared unconstitutional by the State courts, much importance was attached by this court to the fact that "the Legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration; and to the fact that during the period covered by their enactment neither of the other departments of the Government of the State lifted its voice against them; the acquiesence was universal."

In this case we have not only equally strong declarations by the Legislature, but quite as distinct declarations to the same effect by the executive and judicial departments of the State government.

It has repeatedly been held that the practical construction given for any considerable time, and acquiesced in, to a provision of the Constitution, is entitled to great weight in determining the true construction of such provision. This doctrine is fully recognized in West Virginia in Bridges *v.* Shallcross, 6 West Virgina Reports, p. 575; and in this court in the cases already cited, and in Stewart *v.* Lane, 1 Cranch, 299; Cohens *v.* Virginia, 6 Wheat., 418; Edwards' Lessee *v.* Darby, 12 Wheat., 206; Ogden *v.* Saun-

ders, 12 Wheat., 290; see also Barnes *v.* First Parish of Falmouth, 6 Mass., 401; 1 Story on the Constitution, secs. 405. 407, and 408.

And this court has gone still further, and declared that a statutory contract, valid upon the well-settled practical construction of the Constitution when the contract was made, cannot be invalidated by a subsequent decision holding that construction to be erroneous; nor can contracts, valid by the well-settled practical construction of the Constitution when they were made, be invalidated by an amendment of the Constitution or by a judicial change of construction. (Taylor *v.* Ypsilanti, 105 U. S., 60; Murray *v.* Charleston, 96 U. S., 433; Gelpcke *v.* City of Dubuque, 1 Wall., 206; Havemeyer *v.* Iowa County, 3 Wall., 303; Chicago *v.* Sheldon, 9 Wall., 55; City *v* Lawson, 9 Wall., 485; Olcott *v.* Supervisors, 16 Wall., 690; Dodge *v.* Woolsley, 18 How., 360; Bank *v.* Skelly, 1 Black., 449; Pacific Railroad Co. *v.* Maguire, 20 Wall., 36; Rowan *v.* Runnels, 5 How., 139; O. L. I. & T. Co. *v.* Dibolt, 16 How., 432; Pease *v.* Peck, 18 How., 599; Pine Grove *v.* Talcott, 19 Wall., 678; Matter of Tax Exemption, 58 New Hampshire, 623.)

This doctrine is particularly applicable, and should be most rigorously enforced when the party who asserts the invalidity of the contract has delayed in making such assertion, until, as in this case, it has received the full benefit and advantage of the contract, while the other party is yet to realize the benefits which under the contract it was to enjoy.

If these rules of construction are to have their just influence in ascertaining the meaning of the provision of the West Virginia Constitution under consideration, there can be no doubt of the correctness of our position in respect to it.

And if what has been said only creates a doubt as to its meaning, then, under familiar rules of constitutional construction, under the principle announced in Ogden *v.* Saunders, 12 Wheat., 270, when it was said "it is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt," the validity of the act of March 1st, 1866, must be upheld.

We are not, however, dependent in this case on the practical construction which has everywhere been given to the Constitution. If we look only at the words of the clause under consideration, and the circumstances which led to their adoption, and the construction placed on similar clauses in other States, we will have no difficulty in establishing the power of the Legislature to grant the exemption contained in the act of 1866. In doing this, it is proper to recall certain fundamental principles of constitutional construction. Among these is the fact that the power to exempt is as inherent in a State Legislature as the power to tax, and the further fact that a restraint on the power to exempt must be as clear and unequivocal as a restraint on the power to tax. In City of Richmond *v.* Daniel, 14 Gratt., 387, it was said:

"It [the Legislature] may exercise all power of taxation not prohibited by the Constitution; and it may omit to exercise the power unless compelled to act by mandate of the same 'instrument.'"

And in the City of Richmond *v.* Richmond and Danville Railroad Co., 21 Gratt., 604, it was said:

"The power of exemption as well as the power of taxation, is one of the essential elements of sovereignty. The right of the Legislature to surrender the power of taxation in specific cases has been the subject of one of the ablest

and most exhaustive judicial discussions ever known in the Supreme Court of the United States, and is now regarded as established upon the most solid foundation of public policy and expediency."

And in Williamson *v.* Massey, Auditor, 33 Gratt., 240, it was said:

"The right to exempt from taxation is a right which is incident to the legislative prerogative. It is essential to the welfare of the State that the power of exemption should be vested in the government, and it is as inherent in the legislative department as the power of taxation, and may be exercised by the Legislature at its discretion, except where it is *clearly* forbidden by the organic law."

And Judge Cooley, in his work on Taxation, p. 145, says:

"The general right to make exemptions is involved in the right to apportion taxes, and must be understood to exist where it is not forbidden. The right is supposed to be exercised on reasons of State policy, and, presumptively, such exemptions contribute to the general public benefit."

The same doctrine is announced in Cooley on Constitutional Limitations, p. 127, and in Baltimore and Ohio Railroad Co. *v.* Supervisors, 3 West Va., 328; and in Home of Friendless *v.* Rouse, 8 Wall., 438; and in the cases there cited.

Another principle proper to recall in this connection is the fact that, while a purely voluntary exemption is liable to be recalled or repealed by any subsequent Legislature, an exemption founded on contract and given for a consideration, and which is not prohibited, is irrepealable. This distinction is clearly recognized in Cooley on Taxation, pp. 52–54 and 145, and in Cooley on Constitutional Limitations, pp. 383, 280, and 127.

And in this connection it is proper to observe that the exemption in this case is the result of a contract made on

valuable consideration, of which the State has received and is enjoying, and will continue to enjoy, the benefits.

The exemptions named are such as fall under what the Legislature would do *bene placitum*, and do not apply to the totally different case of a commutation or remission upon a contract, the consideration of which is contributed to the public welfare and to the value of property by the building and operation of a public railroad.

Governed by these principles, we remark that it is not necessary for us, in order to establish the validity of the act of 1866, to find in the Constitution some *grant* of power to the Legislature to exempt. On the contrary, the presumption is that such power exists, and that the act is valid. It is for those who question its validity to show affirmatively some clear and unequivocal declaration of the Constitution which, either in terms or by clear implication, forbids this.

It cannot be successfully argued that the Constitution expressly, or in terms, forbids this, for there is no declaration therein which prohibits exemptions of any kind. But it is claimed that this must be implied, first, from the fact that it is declared that "all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law;" and next, because it is declared that certain specified classes of property may by law be exempted from taxation, and that the enumeration of the classes thus specified excludes all others.

In respect to the first of these declarations, it is earnestly submitted that it has been given a meaning in this case by the Supreme Court of Appeals which is forced and unnatural, and which renders some parts of the provision entirely meaningless. It is said that this is a command to tax all property, and that it is to be read with a full stop after the word taxed; that is to say, "all property, both real and personal, shall be taxed." And so that the words of this provision, which immediately follow, may

be given some significance, it is judicially reconstructed, and made to read, "All property, both real and personal, shall be taxed. All property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law."

Such reconstruction of this sentence is not justified. It introduces a new and independent feature, and effects a complete change in the purpose of the Constitution in respect to this matter. That purpose was a simple and single one, namely, to provide an *ad-valorem* system of taxation. As reconstructed, it not only provides for an *ad-valorem* system, but also for universal taxation, although there is nothing whatever in the Constitution which indicates in the slightest degree any purpose to provide to that end. On the other hand there are indications to the contrary. Surely if the Constitution intended to provide for *universal* taxation, (subject to certain specified exceptions,) this could and would have been done much more definitely than can be implied from a sentence which, standing alone, has always been, and can only properly be, understood to require *ad-valorem* taxation. If the sentence designating the subjects of exemption were omitted, it could not be supposed for a moment that universal taxation was ever contemplated. The provision that taxation shall be equal and uniform, and that all property shall be taxed in proportion to its value, and that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value, is not a grant to tax, for that right exists in the Legislature independently of the Constitution; nor does it require the taxation of all property. It is simply a rule that is intended to prevent discrimination in the rate and manner of taxation upon and the valuation of property that may be subjected to taxation. In other words, it is a direction that property *that is taxed* shall be taxed according to the rules there prescribed; that is to say, the rules shall be uniform in the

different parts of the State; and that among these rules *value* shall always be regarded; but it leaves the Legislature untrammelled in its right to designate the subjects of taxation.

There are several State Constitutions which provide for uniform and *ad-valorem* taxation. There are others which provide for these, and also for universal taxation, (subject, of course, to certain specified exemptions.) But wherever the latter is provided for, it will be found that it is done by a distinct and unmistakable provision to that effect.

That *ad-valorem* taxation was the object sought to be accomplished, is made perfectly apparent when we recur to the condition of things in this regard which affected the people of West Virginia when they adopted the Constitution of 1863. At that time they were governed by the Virginia Constitution of 1850. That Constitution contained these sections:

"Taxation shall be equal and uniform throughout the commonwealth, and all property, *other than slaves*, shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law."

"Every slave who has attained the age of twelve years shall be assessed with a tax equal to and not exceeding that assessed on land of the value of three hundred dollars. Slaves under that age shall not be subject to taxation; and other taxable property may be exempted from taxation by the vote of a majority of the whole number of members elected to each House of the General Assembly." [Charters and Constitution, part 2, p. 1926.]

Regarding this provision relating to other exemptions, it is to be observed that it is not a grant of power to exempt, but a regulation of the manner in which such power is to be exercised.

Under these provisions we are not aware of any complaint that was ever made of the exercise of the power of exempting from taxation; but there were repeated and constant complaints from the people of what is now West

Virginia at those provisions which discriminated between slave and other property, and which required the land owners of the western part of the State to pay taxes on their lands and other property according to its actual value, while the slave owners of the eastern part of the State paid no taxes on slaves under twelve years of age, whatever might be their value, and in no instance paid taxes on slaves on a greater valuation than three hundred dollars, though many were worth very much more. The hardship and injustice of this discrimination becomes apparent when it is remembered that while, in 1860, there were in Virginia over 400,000 slaves, of these less than 15,000 were in what is now West Virginia.

Naturally this evil was one of the first which the people of West Virginia endeavored to prevent, not only as to slaves—which it was supposed at the time that the Constitution was first adopted would continue to exist—but as to all other property subjected to taxation; and they did it by requiring all taxation thereafter to be on the *ad-valorem* principle, and by preventing discrimination between different species of property on which taxes might be imposed. This was definitely done, and only this, when they declared that "all property, both real and personal, should be taxed in proportion to its value, to be ascertained as directed by law," and that "no one species of property *from which a tax may be collected* shall be taxed higher than any other species of property of equal value."

Nor is there anything in that expression which authorizes certain exemptions which can be interpreted to exclude other exemptions. This is not to be considered a restraint on the power of the Legislature. There is nothing that justifies such construction. There is not a word forbidding anything.

In the construction of statutes and constitutions the clear and universally recognized distinction between af-

firmative and negative forms must be kept in mind. Where a general power exists at the common law a statute in affirmative words stating an instance or mode in which such power may be exercised raises no implication of a denial or prohibition of the exercise of the same power in other instances or in other modes. To accomplish this, negative words must be used.

Here, as in most cases of State Constitutions, the people, having all power, vested the whole legislative power—complete sovereignty—in the Senate and House of Delegates, (Con. W. Va., art. 4, sec. 1,) and it could do all law-making things not prohibited to it.

The power of applying and regulating taxation was, therefore, supreme in the Legislature, except so far as it was limited and regulated by the Constitution. It had, therefore, the power to do all that was not forbidden to it. On the principles and distinctions stated, the provision in the Constitution for exemption was not, and could not be, exclusive without negative words, saying, in substance, that nothing should be exempted other than the things enumerated.

Referring to this matter, Sedgwick on the Construction of Statutory and Constitutional Law, p. 29, says:

"Affirmative statutes are statutes passed in the affirmative. And it has been held, with that reverence for the ancient common law which characterizes the early decisions of the English courts, that a statute containing a mere affirmative provision, without any negative expressed or implied, does not alter any common-law rule existing in regard to its subject-matter before the statute. Thus, by the 43 Edward III, c. ii, it was enacted 'that the panel of assize shall be arranged four days before the day of assize;' yet, if this be done two days before the day of assize, it is good, for two days are sufficient at common law; and when the statute is affirmative, it does not toll the common law. So it is said that a statute authorizing a tenant in fee-simple to lease for twenty-one years would not restrain him

from making a lease for sixty years; for this power he had at common law, and there are no negative words. So, where a remedy is given by an affirmative statute, if a remedy previously existed at common law, and is not prohibited by express words, it is not taken away, but the party has his election. Thus it has been held in this country that where a statute authorizing the erection of a mill-dam provided a summary mode of appraising and paying the damages resulting from such erection, that the common-law redress by action, nevertheless, still remained."

A striktng illustration of this principle is found in the case of Börs *v.* Preston, 111 U. S., 252, in which it was attempted to maintain that the declaration of the Federal Constitution, that in all cases affecting ambassadors, other public ministers, and consuls * * * the Supreme Court shall have original jurisdiction," &c., &c., was a declaration of *exclusive*, as well as original, jurisdiction in the Supreme Court in such cases. The court refused to sustain this claim, and Mr. Justice Harlan, delivering the opinion of the court, said:

"The judiciary act of 1789 invested the District Courts of the United States with 'jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls,' except for offences of a certain character; this court, with original but not exclusive jurisdiction of all suits * * * in which a consul or vice-consul shall be a party; and the Circuit Court with jurisdiction of civil suits in which an alien is a party. (1 Stat., 76–80.) In this act we have an affirmance by the first Congress, many of whose members participated in the convention which adopted the Constitution, and were, therefore, conversant with the purposes of its framers, of the principle that the original jurisdiction of this court of cases in which a consul or vice-consul is a party, is not necessarily exclusive, and that the subordinate courts of the Union may be invested with jurisdiction of cases affecting such representatives of foreign Governments. On a question of constitutional construction this fact is entitled to great weight."

Quoting the language of Chief Justice Taney, in Gittings *v.* Crawford, Taney's Dec., 1, Mr. Justice Harlan, on p. 260, says:

"The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that impart a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter."

And the same principle is still further illustrated in the decision of the "Legal Tender Case," reported in 110 U. S., 421.

The Virginia Constitution of 1870 (art. 10, sec. 3) [Appendix, p. 4] uses language similar to that of West Virginia; and in Williamson *v.* Massie, Auditor, 33 Gratt., 244, the Virginia Court of Appeals said:

"Nor is it taken away or forbidden by section 3 of the same article of the Constitution. That article does not forbid, but authorizes, exemptions by the Legislature in certain specified cases without forbidding it in others. The language is: 'The Legislature may exempt all property used exclusively for State, county, municipal, benevolent, and charitable purposes.' If it had intended to forbid its exempting other property, it would have been easy to add the words 'but no other;' and we think if its purpose had been to deprive the Legislature of a power the exercise of which, in cases that might arise, might be so beneficial to the State, and the inhibition of which might be so hurtful, the above words or their equivalent would have been added."

Looking to the decisions on this subject, we find that in Williamson *v.* Massie, Auditor, 33 Gratt., 241, the Court of Appeals of Virginia, interpreting the Virginia Constitution of 1870, said:

"It was not intended to require the Legislature to tax

all the property in the State, and forbid its exercising its inherent power, when necessary for the public interest and promotive of a sound public policy, to exempt certain property from taxation, but only to prescribe a rule by which the Legislature should be guided in apportioning taxation, that all property *taxed* should be taxed in proportion to its value; that it does not mean to take from the Legislature its important inherent power of exercising a discretion, when in its wisdom it may be deemed beneficial to the public, of exempting certain property from taxation, is more apparent when read in connection with the first clause in the sentence, which declares that taxation 'shall be equal and uniform,' and then follows the clause in question, separated from it only by a comma, 'and all property,'—not only personal property or only real property—but 'all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.' Giving to the language of this section its proper signification, and to each member of the sentence and to each sentence its just influence and bearing in conveying the meaning of the whole, it was the intention to require that taxation should be on the *ad valorem* principle, and that it should be equal and uniform; and it was no purpose of the framers of the Constitution, by this section, to restrict the Legislature in the subjects of taxation, or to divest it of an important element of sovereignty, by an inflexible inhibition of exempting in any case property from taxation."

In Mississippi Mills *v.* Cook, 56 Miss., 40, in which the meaning of the expression "all property shall be taxed in proportion to its value, to be ascertained as directed by law," was involved, it was said that this provision "does not require that *all* property shall be taxed, and deny to the Legislature the right to exempt any."

In Chesapeake and Ohio Railroad Company *v.* Virginia, 27 Gratt., 352, and 94 U. S., 718, the extent of the exemption granted by the Virginia act of 1866 was involved.

That act was passed under the Virginia Constitution of 1864, which declared that all property shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law;" and it was conceded by the State and all the courts that the exemption was valid, and covered that part of the Chesapeake and Ohio Railroad which would have been the Covington and Ohio Railroad if there had been any organization under the acts of 1866.

In Hunsecker *v.* Wright, 30 Illinois, 146, it was held that while exemptions generally were prohibited, this prohibition did not prevent exemptions as a matter of contract and for a consideration.

In Portland *v.* Water-Power Co., 67 Me., 137, speaking of the Constitution of Maine, which provides that "all taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof," it was said:

"The requirement is, not that all real estate shall be assessed, but that whatever is assessed shall be apportioned and assessed equally. The plaintiffs argue that a law which exempts water-works in Portland from taxation operates unequally if it does not at the same time exempt all water-works in the State from taxation. But all such works are not alike situated in respect to the benefits created by them. One set may be of vastly more consequence to the State than another. * * * We are not satisfied that the Legislature cannot, by charter or contract, in any case and under any circumstances, for sufficient consideration, release one corporation from taxation merely because it does not include in its exclusion from taxation all similar corporations in the State."

And in Stratton *v.* Collins, 43 New Jersey Law, 564, speaking of the Constitution of New Jersey, it was said:

"The Constitution directs that property shall be assessed for taxes by uniform rules according to its true value. But it is plain that this provision does not require all

property to be taxed. It leaves the legislative power of selecting the subjects of taxation as untrammeled as it ever was."

In Louisiana *v.* Pillsbury, 105 U. S., 296, speaking of the Louisiana Constitution of 1845, substantially similar to the West Virginia Constitution, it was said—

"That taxation for State purposes, to be equal and uniform within the meaning of the Constitution of 1845, need not have been universal, is a proposition which calls for no argument. It was only necessary that all property on which taxes were levied—not all property in the State—should be taxed according to its value and in conformity with some fixed rate or mode."

In State *v.* North, 27 Mo., 464, it was said:

"The nineteenth section of the bill of rights, which declares that all property subject to taxation in this State shall be taxed in proportion to its value, has been repeatedly construed by this court to mean, not that all the property in the State must be taxed, but that when any article of property is selected for taxation it shall be taxed according to its value, and not specifically."

See also Simmons *v.* State, 12 Mo., 174.
Hamilton *v.* St. Louis, &c., 15 Mo., 1.

In its opinion in this case the Court of Appeals of West Virginia refers to the Constitutions of the States of Ohio, Arkansas, Tennessee, and California, and to decisions in those States which it is claimed support the correctness of its conclusion that the exemption in the act of March 1st, 1866, is in derogation of the Constitution of West Virginia. In respect of these decisions, we have to say that a careful examination of the several constitutions which those decisions construe will show that in each case, except California, the constitutional provision was materially different from that of West Virginia. There was a pro-

vision which commanded the taxation of all property not therein specifically excepted. In California the courts first sustained the power of the Legislature to exempt; subsequently they denied it.

It is immaterial, then, whether we determine the power of the Legislature to grant the exemption from taxation which is involved in this suit by the letter of the Constitution, or by the circumstances which gave rise to it, or by the uniform construction which it had everywhere received until this case was decided by the Supreme Court of Appeals of West Virginia, or by the construction of other courts placed on similar provisions in other Constitutions. The result will be the same in any case, and will establish the correctness of our construction.

If, however, we should be mistaken in this respect, and the court should be of opinion that the exemption of March 1st, 1866, is to any extent repugnant to the Constitution, then it does not by any means follow that this repugnancy applies to the entire exemption. On the contrary, it would only extend to such taxes as are the subject of the provisions of the Constitution under consideration. To the extent of such taxes the exemption would in that case be invalid, but it would be an entirely valid exemption so far as all other taxes are concerned. This is the inevitable result of the doctrine announced in the case of Douglass *v.* Town of Harrisville, 9 West Va., 164, in which the Court of Appeals of West Virginia decided that the provision of the Constitution of 1863 relating to taxation had no application to any but taxes for State purposes; and that taxes for county, district, and municipal purposes were not comprehended thereby. In other words, counties, districts, and municipalities are not required to tax all property, and, as they can only tax when authorized by the Legislature to do so, the discrimination which they may indulge may be expressly permitted by the authority under which they act. Under this [illegible] inter-

pretation of this provision, the Legislature was without restraint in respect to its power to permit or to forbid the imposition of such taxes. In respect to such taxes the Legislature had plenary power under the Constitution of 1863, and it could by contract bind itself not to impose them on specific property, or on the property of a specific party. In the Constitution of 1872, a clause was inserted which intended to require the Legislature to provide against this condition of things thereafter; but even this provision has, in the case referred to, been held to be inoperative without legislative action.

Applying this doctrine to this case, it clearly follows that all taxes for county, district, and municipal purposes could, under the Constitution, be exempted, and to the extent that such taxes are involved in this case they are illegal, and the injunction, to the extent at least of restraining their collection, should have been perpetuated.

The record discloses that of the taxes in suit all but $5,026,62 are for county, district, and municipal taxes.

Such are the legal aspects of the question thus far considered. Judged by legal standards alone, we think we have shown that the judgment in review should be reversed. But if we consider in connection with these the circumstances under which the exemption contained in the act of March 1st, 1866, was conferred, it will be apparent that the highest obligations of honor, which should be exacted from States no less than individuals, are equally urgent in demanding the same result. This exemption was not granted under ordinary circumstances. It was not the result of any solicitation on the part of those who were to enjoy its benefits. They had no part in its enactment or in the enactment of the charter of which it forms part. It was, on the contrary, the voluntary offer and consideration of the States of Virginia and West Virginia, as an inducement to capitalists to undertake the completion of

an important enterprise which the State of Virginia had, in its entirety, attempted to carry out with its own means, and on which it had expended large sums of money, and which, owing to the misfortunes of war, it was powerless to complete. This undertaking, when begun by Virginia, was considered essential to the development of the great resources of the State, and to the prosperity and happiness and homogeneity of its scattered people. Its magnitude was such that it was supposed to be beyond the reach of private capital, and, accordingly, the State itself, then in a condition of great financial prosperity, assumed and undertook the burden. This was done in 1853, under an act which created the Board of Public Works of Virginia a corporation, by the name of the Covington and Ohio Railroad Company, with power and direction "to cause to be constructed and equipped a railroad, with a heavy rail, from some point at or near Covington or Clifton Forge, in the county of Alleghany, by the most practicable route, to some point on the Ohio River not below the mouth of Big Sandy River nor above the town of Point Pleasant."

Under this and successive acts there was appropriated and expended for this object about $3,000,000, when the further progress of the work was arrested by the commencement of hostilities. When peace was restored the State of Virginia found itself dismembered and financially bankrupt; and West Virginia, to which, in the dismemberment of Virginia there had fallen nearly all of the projected railroad, was in no condition to take up the enterprise. The two States and the people thereof were helpless; but the very circumstances which then surrounded them, their very helplessness, only made the consummation of the object which inaugurated the Covington and Ohio Railroad more urgent and imperative. To a large portion of West Virginia the resuscitation and completion of this railroad was deemed the only apparent means to recover the losses of the war, and to put them once more on the high road to

prosperity. It was to the realization of these objects that the wisdom and patriotism of the two States were promptly applied. The result was the concurrent acts of the two Legislatures in 1866. These acts are not confined to the usual grant of power to become a corporation, but they are an invitation to capitalists to avail themselves of the supposed advantages which the two States, under the circumstances, were disposed to bestow. And to the end that this invitation might be most certain to accomplish its great object, the two Legislatures selected a commission to urge its acceptance by capitalists.

This commission acted under this appointment, but it was unable to induce capitalists to engage in the enterprise. Still, realizing that the completion of this enterprise was a work of great importance to the two States, and that it would require a very large outlay of money, without any hope of return to those who might undertake it until long after its completion, and, therefore, to induce capitalists to undertake it, it would be necessary to offer the inducements contained in the act of 1866 and others, the Legislatures of the two States in 1867 passed the concurrent acts of that year, and again sent forth commissioners to urge their acceptance.

The result of these acts and of the endeavors of the commissioners thereunder was the contract of August, 1868, with the Virginia Central Railroad Company which led to the creation of the Chesapeake and Ohio Railroad Company, and by which that company assumed and undertook to construct and operate the projected railroad which would connect the waters of the Chesapeake Bay with the Ohio river, and which, in a joint resolution of the West Virginia Legislature adopted November 14th, 1868, [Appendix, p. 71,] commending the enterprise to the aid of Congress, was said would "pass through a country richer perhaps in the deposits of those elements of national wealth and strength —coal and iron combined—than any land now known or

accessible," and from "its central position, its favorable location as to climate, distance, and grade, will be of incalculable advantage to the General Government in its military necessities, either in time of peace or war."

Under this contract, the result of the acts of 1866 and 1867, the work was promptly begun; and before the time limited for that purpose it was faithfully completed, as required by that contract. Thus Virginia and West Virginia, without the outlay of another dollar by them, have realized the object aimed at in the act of 1853, and which, if completed according to the scheme of that act, would, it is safe to say, have cost the States quite as much as it cost the Chesapeake and Ohio Railroad Company; and the cost to that company is manifest from the larger mortgage and other indebtedness of that company created after that contract and existing at the time of the foreclosure proceedings to which reference has been made. The result to West Virginia has been the completion of a great thoroughfare across its borders, a marvelous development of its resources which has largely added to its taxable values, an increase of population almost equal to that of any other State in the Union, and general prosperity, enlightenment, and happiness among its people. And it holds on to these advantages, and could not be induced, if it were possible, to surrender them. These benefits were the direct result of the millions of money that were expended under the contract by which the Chesapeake and Ohio Railroad Company was formed; and among the inducements to the expenditure of this vast sum was the exemption from taxation under consideration. There can be no question that between individuals a court of equity would not tolerate for a moment a suitor who, while holding on to the benefits which he derived under the contract, was yet seeking to escape the obligations which by the contract were imposed on him, because of the illegality of the contract. This would be so also of a private or municipal corporation.

And why not of the State in a matter of contract? In such matters the State lays aside its sovereignty and acts as any other contracting party, and it should accordingly be held to do such equity as any other contracting party would be required to do. This is notably so when, as the record in this case shows that the railroad company, which was of course organized for profit, has not yet made ten per cent. in the aggregate on its capital.

Before leaving this subject, it is proper to call special attention to the fact that among the classes of property which are expressly authorized to be exempted is "public property." The precise meaning of this expression, in the sense in which it is used in the Constitution, is not free from doubt. If it is given a strict technical meaning, so as to limit it to property owned exclusively by the public, it would seem to have been wholly unnecessary, as it is a rule of universal application that property of that character is not comprehended by either constitutional or statutory requirements to tax all property. (See Desty or Taxation, p. 34, and cases cited.)

This expression—"public property"—should be given a more general meaning, and be construed to include property originally purely public and devoted to public purposes, including income, although now owned by a corporation created for public purposes, and succeeding to the property for precisely the same use, although to some extent entitled to private gain. In this sense, under the authority of what is said in Taylor *v.* Ypsilante, 105 U. S., 60, the property on which the taxes in this case are imposed is public property. In the case of Swan *v.* Williams, 2 Mich., 427, which is referred to with approval in Taylor *v.* Ypsilante, it was said:

"The very existence of the latter—railroad corporations—was based as well upon the delegation to them of the sovereign power to take private property for public use as upon the continued exercise of that power in the use of the

property for the purposes for which it was condemned; that such corporations are the means employed to carry into execution a given power; that the character of the corporation is determined, not so much by the object sought by it as by that designed by the Legislature; that, if that object be the public interest, to be secured by the exercise of powers delegated for that purpose, which would otherwise repose in the State, the corporation is public, although private interests may be incidentally promoted; that such a corporation is essentially "the trustee of the Government for the promotion of the objects desired—a mere agent to which authority is delegated to work out the public interest through the means provided for that purpose—and broadly distinguished from one created for the attainment of no public end, and from which no benefit accrues to the community, except such as results incidentally, and not necessarily, from its operations."

And that there might be no doubt as to the scope of the decision, Martin, J., speaking for the whole court, further said:

"Nor can it be said that the property when taken is not used by the public, but by the corporators, for their own profit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators, but it is nevertheless true that the object of the Government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the services. If this be not the correct view, then we confess we are unable to find any authority in the Government to accomplish any work of public utility through any private medium or by designated authority. Yet all past history tells us that Governments have more frequently effected these purposes through the aid of companies and corporations than by their immediate agents, and all experience tells us that this is the most wise and economical method of securing these improvements. * * * The purpose designed by the Government in the construction of these roads is the *use* of the public, the expeditious communication from point to point, and not revenue."

In Portland *v.* Water Co., 67 Me., 137, the validity of an act exempting the property of the Portland Water Company, a private corporation, being under consideration, the court said:

"The property of the defendants has been appropriated and devoted to a public use, and may be exempted from taxation for the same reason that town houses and school houses and railroad tracks are exempted. It was only because their works were public works that they could be permitted to take land for their purposes under the exercise of the right of eminent domain. True, the title of the property is vested in the corporation, but the corporation holds it, to some extent, as a trustee for the public. It must be used for the public, and in a great measure its use may be controlled by the public."

That the property of the complainant in this case may be considered "public property" in this sense of the Constitution, it is only necessary to refer to the fact that if this road had been constructed and operated as originally contemplated, it would have been the property of the State, and in that event, under the principle already adverted to, clearly free from all taxation; of to the fact that, by section 8 the act of March 1st, 1866, [Appendix, pp. 37, 63,] the entire franchise and railroad were to revert to and become the property of the State in case the road was not begun or not completed within the time limited; to the fact that by the joint resolution of November, 1868, in which an appeal was made to Congress to give it financial aid, it was represented to be a work of National as well as State importance; to the fact that all railroads are in a sense public highways, and, in the language of the West Virginia Constitution of 1872, "free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law;" to the fact that, as devoted to public use, they can exercise the power of eminent domain, which power is expressly denied for merely private purposes;

and to the fact that in its rates, charges, and manner of doing business, they are under legislative direction and control.

In the answer filed by the auditor to the bill of complaint in this case it is contended, that although the exemption from taxation may have been authorized, and is therefore valid, it was personal to the Chesapeake and Ohio Railroad Company, which was formed under the contract of August, 1868, and that such exemption did not pass to and has not been vested in the Chesapeake and Ohio Railway Company. This point was also made by the counsel for the defendant in the argument of this case in the Supreme Court of Appeals of West Virginia, but was not decided by that court in the disposition of the case. The fact that it was not decided, and that the court based its decision solely on the constitutional question which we have considered, justifies the inference that in the opinion of that court the exemption did pass to the complainant. It is reasonable to suppose that if the Supreme Court of Appeals of West Virginia had been of opinion that the exemption was not vested in complainant, and could have disposed of the case on that ground, it would have done so, and would have refrained from deciding a point which, if correctly decided, assails the validity of so many acts of coördinate departments of the Government. In this view of this matter it would seem hardly necessary to take further notice of this point; but as the matter is likely to be presented on behalf of the defendant, it is proper that we should briefly refer to it.

And in respect to this matter we may say that we believe this whole controversy has grown out of a misapprehension of the decision of the case of Morgan *v.* Louisiana, 93 U. S., 223; that the supposed right to tax the property of this company was originally based on what was understood to have been decided in that case, and not on any doubt of the validity of the exemption; and that, but for

such misapprehension, there would have been no attempt to impose the taxes in this case for 1879.

In the case of Humphreys *v.* Pegues, reported in 16 Wallace, page 244, it was decided that an exemption from taxation passes by the words "powers, rights, and privileges," where, by statute, the powers, rights, and privileges of a corporation can be transferred.

The language of the act under consideration in that case, as found on page 245, is as follows:

"That all the powers, rights, and privileges granted by the charter of the Northwestern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company, and subjected to the conditions therein contained."

The West Virginia statute not only permits them to be transferred, but expressly directs that they shall be transferred, and to that end uses substantially the same words which received judicial construction in Humphreys *v.* Pegues, 16 Wallace, 244.

The language of the West Virginia act of 1871, page 91, is as follows [Appendix, p. 70]:

"The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights, and privileges, and perform all such duties, as would have been had, or should have been performed, by the first company but for such sale and conveyance."

See also act 1877, page 14, and Code of Virginia, (1860,) page 356. [Appendix, pp. 49 to 51.]

The case of Morgan *v.* Louisiana, in 93 U. S., 223, is not at all against Humphreys *v.* Pegues, but rather approves it. It is clearly distinguishable from it. The only point decided there is that the word "franchises," without other words, is inadequate to include an exemption from taxation.

The difference between Humphreys *v.* Pegues is dis-

tinctly pointed out in Railroad Co. *v.* Hambler, 102 U. S. Reps., page 277. Chief Justice Waite says in that case:

"In Humphreys *v.* Pegues we held that immunity from taxation *did* pass under a transfer of '*all the powers, rights, and privileges*' of a railroad corporation, but in Morgan *v.* Louisiana that it did not pass by a transfer of *property and franchises only.*"

In the case of Knoxville and Ohio Railroad Company *v.* Hicks, reported in 15 American Railway Reports on page 197, it is decided by the Supreme Court of Tennessee that "where a railroad, exempted by its charter from taxation, is sold in foreclosure to a purchaser who takes its franchises and all rights, privileges, and immunities thereto appertaining, he acquires its exemption from taxation."

This same doctrine is asserted by Mr. Justice Matthews in State of Tennessee *v.* Whitworth, 22 Fed. Rep., 81. It is also decided in Chicago, M. and St. Paul Railroad Company *v.* Pfaender, 23 Minnesota, 217; First Division St. Paul and Pacific Railroad Company *v.* Parcher, 14 Minn., 297–329; Atlantic and Gulf Railroad Company *v.* Allen, 15 Florida, 637; Nichols *v.* New Hampshire and Northampton Company, 42 Conn., 103; State *v.* Betts, 4 Zab., (New Jersey,) 556. The case of Knoxville and Ohio Railroad Company *v.* Hicks is referred to with approval in Railroad Company *v.* County of Hamblen, 102 U. S., page 277, and Wilson *v.* Gaines, 103 U. S., 422. Railroad Company *v.* Commissioners, 103 U. S., page 1, does not militate against our position. In that case only such rights, powers, and privileges of another company *as were necessary to construct and repair a railroad* were granted; and it was held that, as exemption from taxation was not necessary to *construct and repair*, therefore it was not granted. Nor is the case of Wilson *v.* Gaines, 103 U. S., page 421, against our position. In that case a railroad was sold to satisfy a lien held by the State; that

lien was only upon the *property* of the company, and it was held that the sale made under the lien did not pass an exemption from taxation.

In the case of the Louisville and Nashville Railroad Company *v.* Gaines, Comptroller of the Treasury of Tennessee, decided by Judge Baxter in the United States Circuit Court for the middle district of Tennessee, this very question arose, and was decided as we contend it should be here. The opinion of Judge Baxter is a very able one, and will be found printed in full in the Chicago Legal News, under date of August 14th, 1880, on page 407. In that case he holds:

"Where one railroad company is incorporated with the 'rights, powers, and privileges' of a pre-existing company, the new company acquires an exemption from taxation guaranteed to the former. The word 'privileges' includes in its ordinary definition an exemption or immunity from taxation." State of Tennessee *v.* Whitworth, 22 Federal Reporter, 81.

Under these authorities there can be no doubt that the exemption passed to the plaintiff in error, and that it is entitled to the benefit thereof. On the whole case, we respectfully submit that the decree appealed from should be reversed and the injunction reinstated and made perpetual.

WILLIAM H. HOGEMAN,
WILLIAM J. ROBERTSON, and
GEO. F. EDMUNDS,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 203.

CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,

vs.

JOHN S. MILLER, Auditor of the State of West Virginia, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

APPENDIX TO BRIEF FOR PLAINTIFF IN ERROR.

WASHINGTON, D. C.:
1885.

The following extracts from the Constitutions, laws, and public documents of Virginia and West Virginia are referred to in the brief filed on behalf of the plaintiff in error in the case of the Chesapeake and Ohio Railway Company, plaintiff in error, against Joseph S. Miller, Auditor, &c., defendant in error.

Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious, or charitable purposes, and public property, may, by law, be exempted from taxation.

Sec. 1, *Art.* 8, *W. Va. Constitution*, 1863.

The legislature shall provide, as soon as practicable, for the establishment of a thorough and efficient system of free schools. They shall provide for the support of such schools by appropriating thereto the interest of the invested school-fund; the net proceeds of all forfeitures, confiscations, and fines accruing to this State under the laws thereof; and by general taxation on persons and property, or otherwise. They shall also provide for raising, in each township, by the authority of the people thereof, such a proportion of the amount required for the support of free schools therein as shall be prescribed by general laws.

Sec. 2, *Art.* 10, *W. Va. Constitution*, 1863.

Taxation shall be equal and uniform throughout the commonwealth, and all property shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law. The general assembly may levy a tax on incomes, salaries, and licenses, but no tax shall be levied on property from which any income so taxed is derived on the capital invested in trade or business in respect to which the license so taxed is issued.

Sec. 23, *Art.* 4, *Virginia Constitution*, 1864.

Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educationol, literary, scientific, religious, or charitable purposes, all cemeteries and public property, may, by law, be exempt from taxation. The legislature shall have power to tax, by uniform

and equal laws, all privileges and franchises of persons and corporations.

Sec. 1, *Art.* 10, *W. Va. Constitution*, 1872.

The board of supervisors of each county, a majority of whom shall be a quorum, shall, under such general regulations as may be prescribed by law, have the superintendence and administration of the internal affairs and fiscal concerns of their county, including the establishment and regulation of roads, public landings, ferries, and mills; the granting of ordinary and other licenses; and the laying, collecting, and disbursement of the county levies; but all writs of *ad quod damnum* shall issue from the circuit courts. They shall from time to time appoint the places for holding elections in the several townships of their county; and shall be the judge of the election, qualifications, and returns of their own members, and of all county and township officers.

Sec. 4, *Art.* 7, *W. Va. Constitution*, 1863.

Taxation, except as hereinafter provided, whether imposed by the State, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value.

Sec. 1, *Art.* 10, *Virginia Constitution*, 1870.

No tax shall be imposed on any of the citizens of this State for the privilege of taking or catching oysters from their natural beds with tongs, in the waters thereof, but the amount of sales of oysters so taken by any citizen in any one year may be taxed at a rate not exceeding the rate of taxation imposed upon any other species of property.

Sec. 2, *Art.* 10, *Virginia Constitution*, 1870.

The legislature may exempt all property used exclusively for the State, county, municipal, benevolent, charitable, educational, and religious purposes.

Sec. 3, *Art.* 10, *Virginia Constitution*, 1870.

The president, secretary or principal accounting officer of every railroad company, whether deriving its corporate powers exclusively from this State or not, shall list for taxation at its true value in money, verified by the oath or affirmation of the officer so listing, all the property, money, and credits of such company, of whatsoever kind, wholly held or used in this state, and also the proportional value of all locomotives and rolling-stock passing in and out of this state on railroads crossing the lines thereof, to be ascertained by the proportion which the number of miles run within this state by such locomotives and other rolling-stock, may bear to the whole number of miles run by such locomotives and other rolling-stock over the road belonging to such company or any connecting line; the proportional value of all such locomotives and other rolling-stock so ascertained, to be assessed as the property of the company owning and using the same, whether it be run upon its own or any other railroad within this state. The property exempt from taxation by the charter of any such company shall not be assessed.

The proportional value of all locomotives and other rolling-stock, and the value of all other personal and movable property, money and credits shall be added to the stationary and fixed property and real estate, and shall be appointed by such officer to each county through which the road passes *pro rata*, in proportion to the fixed property and real estate belonging to the company in such county; and all property so listed shall be subject to and pay the same taxes as other property listed in such county. Said officer shall, on or before the first day of April, in each year, make out and return such *pro rata* valuation of the real and personal property, and money and credits of such company in the several counties through which such railroad passes, verified as aforesaid, to one of the assessors of each of said counties, respectively. If said assessor is of opinion that false or incorrect valuations have been returned, he shall proceed to assess the value of all such property according to the best information he may be able to obtain, in the manner prescribed in section sixty-nine of this act.

Sec. 52, *Chap.* 118. *W. Va. Acts*, 1863.

All personal property described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say: All

public and family libraries ; all books apparatus and furniture belonging to colleges, incorporated academies and free schools, and used for college and school purposes ; or to the public institutions for the education of the deaf, and dumb and the blind; or houses of refuge, or to the lunatic asylum ; and all personal property belonging to orphan asylums; overseers of the poor in their official capacity, and exclusively to the state, or to any county or township therein ; all fire engines or other implements for the extinguishment of fires ; all agricultural productions grown directly from the soil, and the natural increase in number and the products of live stock during the year previous to the first day of February in any year, when such products remain unsold in the possession of the producer on the said first day of February; and all manufactured articles and products of mechanical skill or labor produced in this state during the year previous to the said first day of February, and remaining unsold in the hands of the producer on that day.

Sec. 42, *Chap.* 118, *W. Va. Acts*, 1863.

The forty-second section of chapter one hundred and eighteen of the acts of eighteen hundred and sixty-three, entitled "An Act to provide for the assessment of taxes" is hereby amended and re-enacted so as to read as follows :

42. "All personal property described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say: All public and family libraries ; all books, apparatus, furniture, donation and money belonging to colleges, incorporated academies and free schools, and used for college and school purposes ; or to the public institutions for the education of the deaf and dumb and the blind ; or houses of refuge, or to the lunatic asylum ; and all personal property belonging to orphan asylums, or overseers of the poor in their official capacity ; and exclusively to the State, or to any county or township therein ; all fire engines or other implements for the extinguishment of fires ; all agricultural productions grown directly from the soil, and the natural increase in number and the products of live stock during the year previous to the first day of February, in any year, when such products remain unsold in the possession of the producer on said first day of February ; and

all manufactured articles and products of mechanical skill or labor produced in this state during the year previous to the said first day of February, and remaining unsold in the hands of the producer on that day."

Sec. 42, *Chap.* 62, *W. Va. Acts*, 1868.

All property, real or personal, described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say:

Property belonging to the United States or which, by the laws of the United States, is exempt from taxation by or under state authority;

Property belonging exclusively to the state;

Property belonging exclusively to any county, township, city, village, or town in this state, and used for public purposes;

Property used exclusively for divine worship; parsonages, and the household goods and furniture pertaining thereto; burial grounds;

Property belonging to colleges, academies, and free schools, if used for educational purposes, including books, apparatus, annuities; money, and furniture;

Public and family libraries;

Property used for public and charitable purposes, and not held or leased out for profit, including property of agricultural associations;

Property belonging to any public institution for the education of the deaf, dumb, or blind, or to any hospital, house of refuge, lunatic or orphan asylum; to the overseers of the poor or to the board of supervisors as their successors, in their official capacity; fire engines and implements for the extinguishment of fires, and property used exclusively for the safe keeping thereof, and for the meeting of fire companies;

Agricultural productions grown directly from the soil, and the products and increase in number of live stock produced within this state during the year preceeding the first day of April, and remaining unsold on that day in the possession of the original owner or his agent;

The produce during the same time of mines, salt wells, and oil wells within this state, remaining unsold in the hands of the producer or his agent, on the first day of April;

And all manufactured articles, and products of mechanical skill and labor, produced in this state during the same time, and remaining unsold on the first day of April, in the hands of the producer, or his agent.

Sec. 43, *Chap.* 29, *Code W. Va.*

The president, secretary, or principal accounting officer of every railroad company, whether deriving its corporate powers exclusively from the state or not, shall list for taxation at its true value in money, verified by the oath or affirmation of the officer so listing, all the property, money, credits, and investments of such company, of whatsoever kind, wholly held or used in this state, and also the proportional value of all locomotives and rolling-stock passing in and out of this state on railroads crossing the lines thereof, to be ascertained by the proportion which the number of miles run within this state by such locomotives and other rolling-stock may bear to the whole number of miles run by such locomotives and other rolling stock over the road belonging to such company or any connecting line; the proportional value of all such locomotives and other rolling stock so ascertained, to be assessed as the property of the company owning and using the same, whether it be run upon its own or any other railroad within this state. The property exempt from taxation by the charter of such company or otherwise shall not be assessed. The proportional value of all locomotives and other rolling stock, and the value of all other personal and movable property, money, credits and investments, shall be added to the stationary and fixed property and real estate, and shall be apportioned by such officer to each county through which the road passes, in proportion tothe fixed property and real estate belonging to the company in such county; and all the property so listed shall be subject to and pay the same taxes as other property listed in such county. Provided that the road bed, bridges, tunnels, depots, stations, machine shops, machinery, freight houses, stock yards, rolling stock, and all other necessary appendages and structures connected

and used therewith, together with all the real estate which the company is allowed by law to hold, shall be listed as aforesaid, or assessed by the board of commissioners as hereinafter provided, at their actual value in money, without reference to the amount expended in the construction or purchase thereof. Said officer shall, on or before the first day of April in each year, make out and file with the Auditor such list and *pro rata* valuation of the real and personal property, and money, credits and investments of such company verified as aforesaid. The Auditor shall lay said list and valuation before the board of public works as soon as possible after the filing thereof, and if the same be deemed satisfactory, the said board shall direct the Auditor to assess the property of such company for state and general free school and county purposes, and for free school purposes in each township and independent school district through which said railroad runs, as hereinafter provided, upon the valuation of its property as contained in said list, and the Auditor shall assess the same accordingly. But if the said list and valuation be not satisfactory to the board, or if any such railroad company fail to file the list and valuation herein required, the said board shall, as soon as possible after the said first day of April, appoint a board of commissioners, consisting of one discreet and intelligent freeholder from each congressional district of the state, to assess the property of said company, as hereinafter required; but no person shall be appointed as such commissioner who resides in a county through which a railroad runs. It shall be the duty of the said commissioners, as soon as they are informed of their appointment, to convene at some convenient point on the line of railroad to be assessed, and to examine, as far as practicable, all the taxable property of such railroad company hereinbefore mentioned within each of the counties of this state, and to assess the fair value thereof, in money, for the purpose of taxation, upon the principles hereinbefore stated. If a statement of the property of such company has been filed as herein required, a copy thereof shall be delivered to said commissioners by the Auditor to enable them to discharge their duties; but if no such statement has been filed, the said commissioners shall assess the value of such property within each county of this state upon the principles aforesaid, from the best information

they can obtain. The assessment so made by the said commissioners shall be returned by them to the Auditor on or before the first day of July succeeding their appointment, and their decision shall be final. In case the list and valuation of the property filed with the Auditor as aforesaid be satisfactory to the board of public works, and in cases where an assessment of the property of such company is made and returned by the board of commissioners as aforesaid, the Auditor shall immediately certify to the board of supervisors of each county through which such railroad runs, the value of the property therein of every such company, as valued or assessed as aforesaid; and it shall be the duty of such board to apportion such value between the several townships and independent school districts in their county through which such road runs, as near as may be according to the value thereof, in each of said townships and districts. It shall be the duty of the clerk of the board of supervisors of every county through which such railroad runs, within ten days after the county levy of such county is laid, to certify to the Auditor, the amount levied upon each one hundred dollars value of the property therein for county purposes. Provided, that no railroad company shall be taxed by any county for the purpose of building or to assist in building any other railroad. It shall also be the duty of the secretary of the board of education of every such township and independent school district, within ten days after a levy is laid therein for free school purpose, to certify to the Auditor the amount levied for such purposes upon each one hundred dollars value of the property therein. And it shall be the duty of the Auditor to charge every railroad company assessed under the provisions of this section, in a book to be kept by him for that purpose, as follows:

I. With the whole amount of taxes upon its property, in each year, for state and general free school purposes.

II. With the amount payable to each county through which such road runs, for county purposes as aforesaid.

III. With the amount payable to each township and independent school district through which such road runs, for free school purposes.

The Auditor shall, on or before the fifteenth day of December, in each year, make out and transmit by mail or otherwise a statement of all the taxes and levies so charged, to the president, secretary, or principal accounting officer of such company. And it shall be the duty of such company so assessed and charged to pay the whole amount of such taxes and levies upon its property into the treasury of the state, by the twentieth day of January next after the assessment thereof; subject to a deduction of two-and-a-half per centum upon the whole sum, if the same be paid in on or before that day. If any such company fail to pay such taxes and levies by the said twentieth day of January, the Auditor shall add ten per centum to the amount thereof to pay the expenses of collecting the same, and shall certify to the sheriff of each county the amount of such taxes and levies assessed within his county; and it shall be the duty of every sheriff to collect and account for such taxes and levies in the same manner as other taxes and levies are collected and accounted for by him. And when the township and independent school district and levies are collected by him he shall immediately pay the same to the treasurer of the proper township or district. When such taxes and levies are paid into the treasury as herein provided, the Auditor shall account to the sheriff of each of the counties to which any sum so paid in for county levies belongs, for the amount due such county, and may arrange the same with such sheriff in his settlement for the state taxes, in such way as may be most convenient; and the sheriff shall account to the board of supervisors of his county for the amount so received by him, in the same manner as for other county levies. The amount so paid in for each township and independent school district shall be added to the distributable share of the school fund payable to such township or district, and paid upon the requisition of the county superintendent of free schools, in like manner as other school monies are paid. The Auditor shall certify to the board of supervisors of every such county, on or before the first day of April in each year, the amount with which the sheriff thereof is chargeable on account of the levy upon the property of such company. He shall also certify to the county superintendent of free schools the amount of such levies due to each township and independent school district in his county.

The right of the state or of any county or township to enforce, by suit or otherwise, the collection of taxes or levies heretofore assessed or the right to which has heretofore accrued shall not in any manner be affected or impaired by anything in this chapter contained. The taxes and levies so assessed upon the said property of any such railroad company for any year shall, when paid, be in full of all taxes and levies of every sort and description which might be assessed upon its property for such year, if this section had not been passed; and no other assessments shall be made in any year upon the property of such company than is heretofore provided for in this section, except that all buildings and real estate owned by such company and used or occupied for any purpose not immediately connected with its railroad, or which is rented for any purpose to individuals, shall be assessed with and taxes shall be paid thereon the same as other property of the like kind belonging to an individual. Each of the said commissioners shall be paid out of the treasury of the state three dollars per day for each day he shall be actually and necessarily employed in the discharge of his duties under this section, and five cents per mile for each mile necessarily traveled by him in going and returning in the discharge of such duties. Vacancies in the board of commissioners shall be filled, and new boards may be appointed, from time to time, by the board of public works, when necessary to carry into effect the provisions of this section.

Sec. 67, *Chap.* 29, *Code, W. Va.*

The president, secretary, or principal accounting officer of every railroad company, whether deriving its corporate powers exclusively from the state or not, shall list for taxation at its true value in money, verified by the oath or affirmation of the officers so listing, all the property, money, credits, and investments of such company, of whatsoever kind, wholly held or used in this state, and also the proportional value of all locomotives and rolling stock passing in and out of this state on railroads crossing the lines thereof, to be ascertained by the proportion which the number of miles run within this state by such locomotives and other rolling stock may bear to the whole number of miles run by such locomotives and other rolling

stock over the road belonging to such company or any connecting line; the proportional value of all such locomotives and other rolling stock so ascertained, to be assessed as the property of the company owning and using the same, whether it be run upon its own or any other railroad within this state. The property exempt from taxation by the charter of such company, or otherwise, shall not be assessed. The proportional value of all locomotives and other rolling stock, and the value of all other personal and movable property, money, credits and investments, shall be added to the stationery and fixed property and real estate, and shall be apportioned by such officer to each county through which the road passes, in proportion to the fixed property and real estate, belonging to the company in such county; and all the property so listed shall be subject to and pay the same taxes as other property listed in such county. *Provided*, that the road bed, bridges, tunnels, depots, stations, machine shops, machinery, freight houses, stock yards, rolling stock, and all other necessary appendages, and structures connected and used therewith, together with all the real estate which the company is allowed by law to hold, shall be listed as aforesaid, or assessed by the board of commissioners as hereafter provided at their actual value in money, without reference to the amount expended in the construction or purchase thereof. Said officer shall, on or before the first day of February in each year, make out and file with the Auditor, such list and *pro rata* valuation of the real and personal property, and money, credits, and investments of such company verified as aforesaid. The Auditor shall lay said list and valuation before the board of public works as soon as possible after the filing thereof, and if the same be deemed satisfactory, the said board shall direct the Auditor to assess the property of such company for state and general free school and county purposes, and for free school purposes in each district and indep ndent school district through which said railroad runs, as hereinafter provided, upon the valuation of its property as contained in said list, and the Auditor shall assess the same accordingly. But if the said list and valuation be not satisfactory to the board, or if such railroad company fail to file the list and valuation herein required, the said board shall, as soon as possible after the said first day February, appoint a board of

commissioners, consisting of one discreet and intelligent freeholder from each congressional district of the state, to assess the property of said company as hereinafter required; but no person shall be appointed as such commissioner who resides in a county through which a railroad runs. It shall be the duty of the said commissioners, as soon as they are informed of their appointment, to convene at some convenient point on the line of the railroad to be assessed, and to examine as far as practicable, all the taxable property of such railroad company, hereinbefore mentioned, within each of the counties of this state, and to assess the fair value thereof, in money, for the purpose of taxation, upon the principles hereinbefore stated. If a statement of the property of such company has been filed as herein required, a copy thereof shall be delivered to said commissioners by the Auditor to enable them to discharge their duties; but if no such statement has been filed, the said commissioners shall assess the value of such property within each county of this state upon the principles aforesaid, from the best information they can obtain. The assessment so made by the said commissioners shall be returned by them to the Auditor on or before the first day of July succeeding their appointment, and their decision shall be final. In case the list and valuation of the property filed with the Auditor as aforesaid be satisfactory to the board of public works, and in cases where an assessment of the property of such company is made and returned by the board of commissioners as aforesaid, the Auditor shall immediately certify to the county court of each county through which such railroad runs, the value of the property therein of every such company, as valued or assessed as aforesaid; and it shall be the duty of such court to apportion such value between the several districts and independent school districts in their county through which such road runs, as near as may be according to the value thereof, in each of said districts. It shall be the duty of the clerk of the county court of every county through which such railroad runs, within ten days after the county levy of such county is laid, to certify to the Auditor the amount levied upon each one hundred dollars value of the property therein for county purposes. Provided, that no railroad company shall be taxed by any county for the purpose of building or to assist in building any other railroad. It shall also

be the duty of the secretary of the board of education of every such district and independent school district, within ten days after a levy is laid therein for free school purposes, to certify to the Auditor the amount levied for such purpose upon each one hundred dollars value of the property therein. And it shall be the duty of the Auditor to charge every railroad company assessed under the provisions of this section, in a book to be kept by him for that purpose, as follows:

I. With the whole amount of taxes upon its property in each year, for state and general free school purposes.

II. With the amount payable to each county through which such road runs, for county purposes aforesaid.

III. With the amount payable to each district and independent school district through which such road runs, for free school purposes.

The Auditor shall, on or before the fifteenth day of December in each year, make out and transmit by mail or otherwise a statement of all the taxes and levies so charged, to the president, secretary or principal accounting officer of such company. And it shall be the duty of such company so assessed and charged to pay the whole amount of such taxes and levies upon its property into the treasury of the state, by the twentieth day of January next after the assessment thereof; subject to a deduction of two and a half per centum upon the whole sum, if the same be paid on or before that day. If any such company fail to pay such taxes and levies by the said twentieth day of January, the Auditor shall add ten per centum to the amount thereof to pay the expenses of collecting the same, and shall certify to the sheriff of each county the amount of such taxes and levies assessed within his county; and it shall be the duty of every such sheriff to collect and account for such taxes and levies in the same manner as other taxes and levies are collected and accounted for by him. And when the district and independent school district taxes and levies are collected by him he shall immediately pay the same to the treasurer of the proper district. When such taxes and levies are paid into the treasury as herein provided, the Auditor shall account to the sheriff of each of the counties to

which any sum so paid in for county levies belongs, for the amount due such county, and may arrange the same with such sheriff in his settlement for the state taxes, in such way as may be most convenient; and the sheriff shall account to the county court of his county, for the amount so received by him, in the same manner as for other county levies. The amount so paid in for each district and independent school district shall be added to the distributable share of the school fund payable to such district, and paid upon the requisition of the county superintendent of free schools, in like manner as other school moneys are paid. The Auditor shall certify to the county court of every such county, on or before the first day of February in each year, the amount with which the sheriff thereof is chargeable on account of the levy upon the property of such company. He shall also certify to the county superintendent of free schools the amount of such levies due to each district and independent school district in his county. The right of the state or of any county or district to enforce by suit, or otherwise, the collection of taxes or levies heretofore assessed or the right to which has heretofore accrued shall not in any manner be affected or impaired by anything in this chapter contained. The taxes and levies so assessed upon the said property of any such railroad company for any year shall, when paid, be in full of all taxes and levies of every sort and description which might be assessed upon its property for such year if this section had not been passed; and no other assessment shall be made in any year upon the property of such company than is heretofore provided for in this section, except that all buildings and real estate owned by such company and used or occupied for any purpose not immediately connected with its railroad; or which is rented for any purpose to individuals, shall be assessed with and taxes shall be paid thereon the same as other property of the like kind belonging to an individual. Each of the said commissioners shall be paid out of the treasury of the state three dollars per day for each day he shall be actually and necessarily employed in the discharge of his duties under this section, and five cents per mile for each mile necessarily traveled by him in going and returning in the discharge of his duties. Vacancies in the board of commissioners, shall be filled, and new boards may be appointed, from time to time,

by the board of public works, when necessary to carry into effect the provisions of this section.

Sec. 67, *Chap.* 54, *Acts*, 1875.

That the sixty-seventh section of the act approved December twentieth, one thousand eight hundred and seventy-five, entitled "an act to amend and re-enact the twenty-ninth chapter of the code, concerning the assessment of taxes" be amended and re-enacted so as to read as follows:

The president, secretary, or principal accounting officer of every railroad company, whether deriving its corporate powers exclusively from the state or not, shall list for taxation at its true value in money, verified by the oath or affirmation of the officers so listing, all the property, money, credits and investments of such company, of whatsoever kind, wholly held or used in this state, and also the proportional value of all locomotives and rolling stock passing in and out of this state on railroads crossing the lines thereof, to be ascertained by the proportion which the number of miles run within this state by such locomotives and other rolling stock may bear to the whole number of miles run by such locomotives and other rolling stock over the road belonging to such company or any connecting line; the proportional value of all such locomotives and other rolling stock so ascertained, to be assessed as the property of the company owning and using the same, whether it be run upon its own or any other railroad within this state. The property exempt from taxation by the charter of such company or otherwise shall not be assessed. The proportional value of all locomotives and other rolling stock, and the value of all other personal and movable property, money, credits, and investments, shall be added to the stationary and fixed property and real estate and shall be apportioned by such officer to each county through which the road passes, in proportion to the fixed property and real estate, belonging to the company in such county; and all the property so listed shall be subject to and pay the same taxes as other property listed in such county. *Provided*, that the road bed, bridges, tunnels, depots, stations, machine shops, machinery, freight houses, stock yards, rolling stock, and all other necessary appendages and structures connected and

used therewith, together with all the real estate which the company is allowed by law to hold, shall be listed as aforesaid, or assessed by the board of commissioners as hereinafter provided, at their actual value in money, without reference to the amount expended in the construction or purchase thereof. Said officer shall, on or before the first day of February in each year, make out and file with the Auditor such list and *pro rata* valuation of the real and personal property, and money, credits and investments of such company, verified as aforesaid. The Auditor shall lay said list and valuation before the board of public works as soon as possible after the filing thereof, and if the same be deemed satisfactory the said board shall direct the Auditor to assess the property of such company for state and general free school and county purposes, and for free school purposes in each county, district and independent school district through which said railroad runs, as hereinafter provided upon the valuation of its property as contained in said list, and the Auditor shall assess the same accordingly. But if the said list and valuation be not satisfactory to the board, or if such railroad company fail to file the list and valuation herein required, the said board shall, as soon as possible after the said first day of February, appoint a board of commissioners, consisting of one discreet and intelligent free holder from each congressional district of the state, to assess the property of said company as hereinafter required; but no person shall be appointed as such commissioner who resides in a county through which a railroad runs. It shall be the duty of the said commissioners, as soon as they are informed of their appointment, to convene at some convenient point on the line of railroads to be assessed, and to examine, as far as practicable, all the taxable property of such railroad company hereinbefore mentioned within each of the counties of this state, and to assess the fair value thereof, in money, for the purpose of taxation, upon the principles hereinbefore stated. If a statement of the property of such company has been filed as herein required, a copy thereof shall be delivered to said commissioners by the Auditor to enable them to discharge their duties; but if no such statement has been filed, the said commissioners shall assess the value of such property within each county of this state upon the principles aforesaid, from the best information

they can obtain. The assessment so made by the said commissioners shall be returned by them to the Auditor on or before the first day of July succeeding their appointment, and their decision shall be final. In case the list and valuation of the property filed with the Auditor as aforesaid be satisfactory to the board of public works, and in cases where an assessment of the property of such company is made and returned by the board of commissioners as aforesaid, the Auditor shall immediately certify to the county court of each county through which such railroad runs, the value of the property therein of every such company, as valued or assessed as aforesaid; and it shall be the duty of such court to apportion such value between the several districts and independent school districts in their county through which such road runs, as near as may be, according to the value thereof in each of said districts. It shall be the duty of the clerk of the county court of every county through which such railroad runs, within ten days after the county levy of such county is laid, to certify to the Auditor the amount levied upon each one hundred dollars value of the property therein for county purposes. *Provided*, that no railroad company shall be taxed by any county for the purpose of building or to assist in building any other railroad. It shall also be the duty of the secretary of the board of education of every such district, county and independent school district, within thirty days after a levy is laid therein for free school purposes, to certify to the Auditor the amount levied for such purposes upon each one hundred dollars value of the property therein, and any officer violating the provisions of this section shall be deemed guilty of a misdemeanor and fined not less than one hundred nor more than five hundred dollars. And it shall be the duty of the Auditor to charge every railroad company assessed under the provisions of this section, in a book to be kept by him for that purpose as follows:

I. With the whole amount of taxes upon its property, in each year, for state and general free school purposes.

II. With the amount payable to each county through which such road runs, for county purposes aforesaid.

III. With the amount payable to each district and independent school district through which such road runs, for free school purposes.

proportional value of all locomotives and rolling stock passing in and out of this state on railroads crossing the lines thereof, to be ascertained by the proportion which the number of miles run within this state by such locomotives and other rolling stock may bear to the whole number of miles run by such locomotives and other rolling stock over the road belonging to such company or any connecting lines; the proportional value of all such locomotives and other rolling stock so ascertained to be assessed as the property of the company owning and using the same, whether it be run upon its own or any other railroad within this state. The proportional value of all locomotives and other rolling stock, and the value of all other personal and movable property, money, credits and investments, shall be added to the stationary and fixed property and real estate, and shall be apportioned by such officer to each county through which the road passes in proportion to the fixed property and real estate belonging to the company in such county; and all the property so listed shall be subject to and pay the same taxes as other property listed in such county. *Provided*, that the road bed, bridges, tunnels, depots, stations, machine shops, machinery, freight houses, stock yards, rolling stock and all other necessary appendages and structures connected and used therewith, together with all the real estate which the company is allowed by law to hold, shall be listed as aforesaid, or assessed by the board of commissioners as hereinafter provided, at their actual value in money, without reference to the amount expended in the construction or purchase thereof. Said officer shall, on or before the first day of February in each year, make out and file with the Auditor such list and *pro rata* valuation of the real and personal property, and money, credits and investments of such company, verified as aforesaid. The Auditor shall lay said list and valuation before the board of public works as soon as possible after the filing thereof, and if the same be deemed satisfactory, the said board shall direct the Auditor to assess the property of such company for state and general free school and county purposes and for free school purposes in each county, district and independent school district through which said railroad runs, as hereinafter provided, upon the valuation of its property as contained in said list, and the Auditor shall assess the same accordingly;

but if the said list and valuation be not satisfactory to the board, or if such railroad company fail to file the list and valuation herein required, the said board shall, as soon as possible after the said first day of February, appoint a board of commissioners, consisting of one discreet and intelligent free holder from each congressional district of the state, to assess the property of said company as hereinafter required; but no person shall be appointed as such commissioner who resides in a county through which a railroad runs.

It shall be the duty of the said commissioners, as soon as they are informed of their appointment, to convene at some convenient point on the line of railroads to be assessed, and to examine, as far as practicable, all the taxable property of such railroad company hereinbefore mentioned within each of the counties of this state, and to assess the fair value thereof in money for the purpose of taxation, upon the principles hereinbefore stated. If a statement of the property of such company has been filed as herein required a copy thereof shall be delivered to said commissioners by the Auditor to enable them to discharge their duties; but if no such statement has been filed, the said commissioners shall assess the value of such property within such county of this state upon the principles aforesaid, from the best information they can obtain. The assessment so made by the said commissioners shall be returned by them to the Auditor on or before the first day of July succeeding their appointment, and their decision shall be final. In case list and valuation of the property filed with the Auditor as aforesaid be satisfactory to the board of public works, and in cases where an assessment of the property of such company is made and returned by the board of commissioners as aforesaid, the Auditor shall immediately certify to the county court of each county or other tribunal in lieu thereof for police and fiscal affairs, through which such railroad runs, the value of the property therein of every such company, as valued or assessed as aforesaid, and it shall be the duty of such court to apportion such value between the several districts and independent school districts in their county through which such road runs, as near as may be, according to the value thereof in each of said districts. It shall be the duty of the clerk of the county court of every county, or the clerk of any tribunal established for police

and fiscal affairs in lieu thereof, through which such railroad runs, within ten days after the county levy of such county is laid, to certify to the Auditor, the appointment made by the county court or tribunal created in lieu thereof as aforesaid, the amount levied upon each one hundred dollars value of the property therein for county purposes. It shall also be the duty of the secretary of the board of education of every such district, county, and independent school district within thirty days after a levy is laid therein for free school purposes, to certify to the Auditor the amount levied for such purposes upon each one hundred dollars value of the property therein, and any officer violating the provisions of this section shall be deemed guilty of a misdemeanor and fined not less than one hundred, nor more than five hundred dollars. And in case of the failure of the secretary of the board of education in any district, and the clerk of the county court or tribunal created in lieu thereof to return to the Auditor, on or before the first day of December in each and every year, such certificate as to the levy aforesaid, then the Auditor may obtain the rate of taxation for county and district purposes from the copies of the assessor's books on file in his office. And it shall be the duty of the Auditor to charge every railroad company assessed under the provisions of this section, in a book to be kept by him for that purpose as follows:

I. With the whole amount of taxes upon its property, in each year, for state and general free school purposes.

II. With amount payable to each county through which such road runs, for county purposes aforesaid.

III. With the amount payable to each district and independent school district through which such road runs, for free school purposes.

The Auditor shall, on or before the tenth day of December in each year, make out and transmit, by mail or otherwise a statement of all taxes and levies so charged to the president, secretary or principal accounting officer of such company. And in case any railroad company is aggrieved by the assessment of its property, or any error shall appear to have been made in making the assessment, the company may file its petition before the board of public works, at any

time before the tenth day of January, asking for a correction of the same; and the said board shall have power to correct errors in the valuation of the property of any such company. In case it be claimed by the company that any error has been made, either by the clerk of the county court or the secretaries of the boards of education in certifying the rate of their levies or the apportionments of the value of the property to the districts, the Auditor may, if it be shown by a corrected certificate of the clerk of the county court, or of the secretary of the board of education, as the case may be, or certified order of the county court making a correct apportionment, that error has been committed, correct the said error. *Provided*, the application be made for such correction at any time before January tenth, in each year. And it shall be the duty of such company so assessed and charged, to pay the whole amount of such taxes and levies upon its property into the treasury of the state, by the twentieth day of January next after the assessment thereof, subject to a deduction of two and a half *per centum* upon the whole sum, if the same be paid on or before that day. If any such company fail to pay such taxes and levies by the said twentieth day of January, the Auditor shall add ten *per centum* to the amount thereof, to pay the expenses of collecting the same, and shall certify to the sheriff of each county the amount of such taxes and levies assessed within his county; and it shall be the duty of every such sheriff to collect and account for such taxes and levies in the same manner as other taxes and levies are collected and accounted for by him. And when the district and independent school district taxes and levies are collected by him, he shall immediately pay the same to the treasurer of the proper district. *Provided*, the authorities of any county shall not be allowed to compromise or remit any portion of said taxes so certified to the sheriff. When such taxes and levies are paid into the treasury as herein provided, the Auditor shall account to the sheriff of each of the counties to which any sum so paid in for county levies belongs, for the amount due such county, and may arrange the same with such sheriff in his settlement for the state taxes in such a way as may be most convenient; and the sheriff shall account to the county court of his county, or any tribunal established for police and fiscal affairs in lieu thereof, for the amount so receiv-

ed by him, in the same manner as for other county levies. The amount so paid in for each district and independent school district shall be added to the distributable share of the school fund payable to such district, and paid upon the requisition of the county superintendent of free schools, in like manner as other school moneys are paid. The Auditor shall certify to the county court, or any tribunal established for police and fiscal affairs in lieu thereof, of every such county, on or before the first day of February in each year, the amount with which the sheriff thereof is chargable on account of the levy upon the property of such company. He shall also certify to the county superintendent of free schools, the amount of such levies due to each district and independent school district in his county. But the failure of the clerks of the county courts or tribunals established in lieu thereof, or the secretaries of the boards of education, to certify to the Auditor the levies or apportionment, within the time herein required, shall not invalidate or prevent the assessment required by this section; but the Auditor shall make the assessment and proceed to collect or certify the same to the sheriff as soon as practicable after he shall obtain the information necessary to make such assessment. The right of the state or any county or district to enforce by suit or otherwise, the collection of taxes or levies heretofore assessed, or the right to which has heretofore accrued, shall not in any manner be affected or impaired by any thing in this chapter contained. The taxes and levies so assessed upon the said property of any such railroad company for any year, shall, when paid, be in full of all taxes and levies of every sort and description which might be assessed upon its property for such years, if this section had not been passed; and no other assessment shall be made in any year upon the property of such company than is heretofore provided for in this section, except that all buildings and real estate owned by such company and used or occupied for any purpose not immediately connected with its railroads, or which is rented for any purpose to individuals, shall be assessed with and taxes shall be paid thereon the same as other property of the like kind belonging to an individual. Each of the said commissioners shall be paid out of the treasury of the state three dollars per day for each day he shall be actually and necessarily employed in the discharge of his

duties under this section, and five cents per mile for each mile necessarily traveled by him in going to and returning in the discharge of his duties.

Vacancies in the board of commissioners shall be filled and new boards may be appointed from time to time by the board of public works, when necessary to carry into effect the provisions of this section.

Sec. 67, *Chap.* 6, *Acts*, 1879.

All property, real or personal, described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say:

Property belonging to the United States, or which by the laws of the United States is exempt from taxation by or under state authority.

Property belonging exclusively to the state.

Property belonging exclusively to any county, district, city, village or town in this state, and used for public purposes.

Property used exclusively for divine worship, parsonages, and the household goods and furniture pertaining thereto; burial grounds.

Property belonging to colleges, academies and free schools, if used for educational purposes, including books, apparatus, annuities, money and furniture.

Public and family libraries.

Property used for public and charitable purposes, and not held or leased out for profit, including the property of agricultural associations.

Property belonging to any public institution for the education of the deaf, dumb or blind, or to any hospital, house of refuge, lunatic or orphan asylum, to the overseers of the poor in their official capacity; fire engines and implements for the extinguishment of fire, and property used exclusively for the safe keeping thereof, and for the meeting of fire companies.

Agricultural productions, grown directly from the soil, and the products and increase in number of live stock produced within this state during the year preceeding the first day of February, and remaining unsold on that day in the possession of the original owner or his agent.

The produce during the same time of mines, salt wells, and oil wells, within this state, remaining unsold in the hands of the producer or his agent, on the first day of February, and all manufactured articles and products of mechanical skill and labor, produced in this state during the same time, and remaining unsold on the first of February, in the hands of the producer or his agent. But no property shall be exempt from taxation which shall have been purchased or procured for the purpose of evading taxation, whether by temporarily holding the same over the first of February or otherwise, whether the same be in this state or elsewhere.

Sec. 43, *Chap.* 73, *Acts*, 1879.

The president, secretary, or principal accounting officer of every railroad company, whether deriving its corporate powers exclusively from the state or not, shall list for taxation at its true value in money, verified by the oath or affirmation of the officers so listing, all the property, money, credits and investments of such company of whatsoever kind, wholly held or used in this state and also the proportional value of all locomotives and rolling stock passing in and out of this state on railroads crossing the lines thereof, to be ascertained by the proportion which the number of miles run within this state by such locomotives and other rolling stock may bear to the whole number of miles run by such locomotives and other rolling stock over the road belonging to such company, or any connecting line; the proportional value of all such locomotives and other rolling stock, so ascertained, to be assessed as the property of the company owning and using the same, whether it be run upon its own or any other railroad within this state. The proportional value of all locomotives and other rolling stock, and the value of all other personal and movable property, money, credits and investments, shall be added to stationary and fixed property and real estate, and shall be apportioned by such officer to each county through which the road passes, in proportion to the fixed property and real estate belonging to the company in such county; and all the property so listed, shall be subjected to and pay the same taxes as other property listed in such county. *Provided*, that the road bed, bridges, tunnels, depots, stations, machine shops, machinery, freight houses, stock yards, rolling stock, and all other necessary appendages, and

structures connected and used therewith, together with all the real estate which the company is allowed by law to hold, shall be listed as aforesaid, or assessed by the board of commissioners, as hereafter provided, at their actual value in money, without reference to the amount expended in the construction or purchase thereof. Said officer shall, on or before the first day of February in each year, make out and file with the Auditor such list and *pro rata* valuation of the real and personal property, and money, credits and investments, of such company verified as aforesaid. The Auditor shall lay said list and valuation before the board of public works as soon as possible after the filing thereof, and if the same be deemed satisfactory, the said board shall direct the Auditor to assess the property of such company for state and general free school and county purposes, and for free school purposes in each district and independent school district, and for municipal corporation purposes through which said railroad runs, as hereinafter provided, upon the valuation of its property as contained in said list, and the Auditor shall assess the same accordingly. The said list and valuation when made shall also be the basis for municipal taxation by any incorporated city or town through which said railroad runs, and the Auditor shall apportion the same in proportion to the real estate and fixed property belonging to said company and located in any such city or town. But if the said list and valuation be not satisfactory to the board, or if such railroad company fail to file the list and valuation herein required, the said board shall, as soon as possible after the first day of February, appoint a board of commissioners, consisting of one discreet and intelligent free holder from each congressional district of the state to assess the property of said company as hereinafter required; but no person shall be appointed as such commissioner who resides in a county through which a railroad runs. It shall be the duty of the said commissioners, as soon as they are informed of their appointment to convene at some convenient point on the line of the railroad to be assessed, and to examine as far as practicable, all the taxable property of such railroad company, hereinbefore mentioned, within each of the counties of this state, and to assess the fair value thereof, in money, for the purpose of taxation, upon the principle hereinbefore stated. If a statement of the property of such company has been filed as herein required,

a copy thereof shall be delivered to said commissioners by the Auditor, to enable them to discharge their duties; but if no such statement has been filed, the said commissioners shall assess the value of such property within each county of this state upon the principle aforesaid, from the best information they can obtain. The assessment so made by the said commissioners shall be returned by them to the Auditor on or before the first day of July, succeeding their appointment, and their decision shall be final. In case the list and valuation of the property filed with the Auditor as aforesaid be satisfactory to the board of public works, and in cases where assessment of the property of such company is made and returned by the board of commissioners as aforesaid, the Auditor shall immediately certify to the county court of each county through which such railroads run, the value of the property therein of every such company, as valued or assessed as aforesaid, and it shall be the duty of such court to apportion such value between such districts and independent school districts and municipal corporations in their county through which such road runs, as near as may be, according to the value thereof in each of said districts and municipal corporations. It shall be the duty of the clerk of the county court of every county through which such railroads run, within thirty days after the county levy of such county is laid to certify to the Auditor the apportionment made by the county court or tribunal created in lieu thereof, the amount levied upon each one hundred dollars value of the property therein for county purposes. It shall also be the duty of the secretary of the board of education, of every such district and independent school district, and the clerk or recorder of every municipal corporation, within thirty days after a levy is laid therein for free school and municipal purposes, to certify to the Auditor the amount levied for such purposes upon each one hundred dollars value of the property therein. And any officer violating the provisions of this section shall be deemed guilty of a misdemeanor and fined not less than one hundred nor more than five hundred dollars. And in case of the failure of the secretary of the board of education in any district, and the clerk of the county court or tribunal created in lieu thereof, to return to the Auditor on or before the first day of December in each and every year such certificate as to

the levy aforesaid, then the Auditor may obtain the rate of taxation for county and district purposes from the copies of the assessor's books on file in his office. And it shall be the duty of the Auditor to charge every railroad company assessed under the provisions of this section, in a book to be kept by him for that purpose, as follows:

I. With the whole amount of taxes upon its property in each year for state and general free school purposes.

II. With the amount payable to each county through which such road runs; for county purposes aforesaid.

III. With the amount payable to each district and independent school district through which such road runs for free school purposes.

IV. With the amount payable to each municipal corporation through which said road runs, for municipal purposes.

The Auditor shall, on or before the tenth day of December in each year, or as soon thereafter as practicable, make out and transmit, by mail or otherwise, a statement of all taxes and levies so charged to the president, secretary or principal accounting officer of such company. And in case any railroad company is aggrieved by the assessment of its property, or any error shall appear to have been made in making the assessment, the company may file its petition before the board of public works any time before the tenth day of January, asking for a correction of the same; and said board shall have power to correct errors in the valuation of the said property of any such company. In case it be claimed by the company that any error has been made, either by the clerk of the county court or the secretaries of the boards of education, in certifying the rate of their levies in the apportionment of the value of the property to the district, the Auditor may, if it be shown by a corrected certificate of the clerk of the county court or the secretary of the board of education, as the case may be, or a certified order of the county court, making a correct apportionment, that error has been committed, correct such error. *Provided*, that application be made for such corrections at any time before January tenth in each year. And it shall be the duty of such company so assessed and charged to pay the whole amount of such taxes and levies upon its property into

the treasury of the state by the twentieth day of January next, after the assessment thereof, subject to a deduction of two and a half *per centum* upon the whole sum, if the same be paid on or before that day. If any such company fail to pay such taxes and levies by the said twentieth day of January, the Auditor shall add ten *per centum* to the amount thereof to pay the expenses of collecting the same, and shall certify to the sheriff of each county the amount of such taxes and levies assessed within his county; and it shall be the duty of every such sheriff to collect and account for such taxes and levies in the same manner as other taxes and levies are collected and accounted for by him. And when the district and independent school district and municipal corporation taxes and levies are collected by him he shall immediately pay the same to the treasurer of the proper district or municipal corporation. *Provided*, the authorities of any county shall not be allowed to compromise or remit any portion of said taxes as certified to the sheriff. When such taxes and levies are paid into the treasury as herein provided, the Auditor shall account to the sheriff of each of the counties to which any sum so paid in for county levies belongs, for the amount due such county and may arrange the same with such sheriff in his settlements for the state taxes in such way as may be most convenient, and the sheriff shall account to the county court of his county for the amount so received by him, in the same manner as for other county levies. The amount so paid in for each district and independent school district, shall be added to the distributable share of the school fund payable to such district, and paid upon the requisition of the county superintendent of free schools, in like manner as other school moneys are paid. The Auditor shall certify to the county court of every such county on or before the first day of February in each year, the amount with which the sheriff thereof is chargable on account of the levy upon the property of such company. He shall also certify to the county superintendent of free schools the amount of such levies due to each district and independent school district in his county: The amount so paid in for each municipal corporation shall as soon as received by the Auditor, be paid over to the treasurer of the municipal corporation to which such taxes are due. But the failure of the clerk of the county courts,

or tribunals established in lieu thereof, or the secretaries of the board of education, to certify to the Auditor the levies or apportionment within the time therein prescribed, shall not invalidate or prevent the assessment required by this section, but the Auditor shall make the assessment and proceed to collect or certify the same to the sheriff as soon as practicable after he shall obtain the information necessary to make such assessment. The right of the state or of any county, or district, or municipal corporation to enforce, by suit, or otherwise, the collection of taxes or levies, heretofore assessed or the right to which has heretofore accrued shall not in any manner be affected or impaired by any thing in this chapter contained. All buildings and real estate owned by such company, and used or occupied for any purpose not immediately connected with its railroad, or which is rented for any purpose to individuals, shall be assessed with and taxes shall be paid thereon the same as other property of the like kind belonging to an individual. Each of said commissioners shall be paid out of the treasury of the state three dollars per day for each day he shall be actually and necessarily employed in the discharge of his duties under this section, and five cents per mile for each mile of necessary travel by him in going and returning in the discharge of his duties. Vacancies in the board of commissioners shall be filled and new boards may be appointed from time to time by the board of public works when necessary to carry into effect the provisions of this section.

Sec. 67, *Chap.* 73, *Acts*, 1879.

All property, real or personal, described in this section, and to the extent, herein limited, shall be exempt from taxation that is to say: Property belonging to the United States, or which by the laws of the United States, is exempt from taxation by, or under state authority; property belonging exclusively to the state; property belonging exclusively to any county, district, city, village or town in this state, and used for public purposes; property used exclusively for divine worship, parsonages, and the household goods and furniture pertaining thereto, burial grounds; property belonging to colleges, acadamies and free

schools, if used for educational purposes, including books, apparatus, annuities, money and furniture; public and family libraries; property used for public and charitable purposes, and not held or leased out for profit, including the property of agricultural associations; property belonging to any public institution for the education of the deaf, dumb or blind, or to any hospital, house of refuge, lunatic or orphan asylum; to the county courts in their corporate capacity; fire engines and implements for the extinguishing of fire, and property used exclusively for the safe keeping thereof, and for the meeting of fire companies; agricultural productions grown directly from the soil, and the products and increase in number of live stock produced within this state during the year preceding the first day of January, and remaining unsold on that day, in the possession of the original owner or his agent; the produce, during the same time, of mines, salt wells and oil wells within this state, remaining unsold in the hands of the producer or his agent on the first day of January; and all manufactured articles and products of mechanical skill and labor produced in this state during the same time, and remaining unsold on the first day of January, in the hands of the producer or his agent; but no property shall be exempt from taxation, which shall have been purchased or procured for the purpose of evading taxation, whether by temporarily holding the same over the first of January or otherwise, whether the same be in this state or elsewhere.

Sec. 43, *Chap.* 12, *Acts*, 1881.

[The Legislature shall provide such revenue as may be necessary by levying a tax, by valuation, so that every person and corporation, shall pay a tax in proportion to the value of the property belonging to them, respectively; such value to be ascertained as the Legislature shall direct. *Provided*, that the Legislature shall have power to exempt from taxation agricultural products grown directly from the soil, in the hands of the producer, and all other products of labor and capital, icnluding live stock, produced within the limits of the state during the year preceding, and remaining in the hands of the producer, But,] *Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one*

species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious, or charitable purposes, all cemeteries and public property, may, by law, be exempted from taxation. The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.

[The property of the state, counties, townships, and other municipal corporations, both real and personal, and such other property as may be used, or the proceeds of which may be used, exclusively for agricultural or horticultural societies, for educational, literary or scientific, religious or charitable purposes, or for a public burial ground, shall be exempt from taxation; but such property and use shall be determined in such manner as the Legislature shall direct by general law, uniform as to the class to which it applies.]

Extract from Journal of Constitutional Convention, 1872.

AN ACT to incorporate the Covington and Ohio Railroad Company.

Passed March 1, 1866.

Be it enacted by the Legislature of West Virginia:

1. That the persons upon whom the benefits of this charter may be hereafter conferred, and who may be organized as hereinafter provided, shall thereupon be constituted a corporation, under the name and style of "The Covington and Ohio Railroad Company," according to the provisions of the Code of Virginia, second edition, for the government of incorporated companies and not inconsistent herewith.

2. The said Covington and Ohio railroad company, when fully constituted and certified as hereinafter provided, shall have all the rights, interest and privileges of whatsoever kind, in and to the Covington and Ohio railroad, and appurtenances thereto belonging, now the property of the State of West Virginia, upon condition that it shall, within six months after its incorporation, as provided in the tenth section of this act, commence and within six years complete, equip and operate a railroad from some point at or near Cov-

ington, Alleghany county, Virginia, and connecting with the Virginia Central railroad, by the way of the White Sulphur Springs, and the valleys of Greenbrier river, New river and Kanawha river, to a point at or near the mouth of Scary creek, and thence to the Ohio river, with the right to adopt the line of the West Virginia Central railway from Charleston to the Ohio river, upon such terms as may be agreed upon with the said West Virginia railway company. The said road to be constructed in a style at least equal to that of the Virginia Central railway, and with grades not higher than those adopted by C. B. Fisk, esquire, the former engineer of the Covington and Ohio railroad.

3. The said Covington and Ohio railroad company shall have the right to construct a branch from its main line to connect with the Virginia and Tennessee railroad at such points as it may deem most expedient, and the said company is hereby empowered to acquire real property necessary for the construction of the said railroad and of the said branch.

4. The capital stock of the company shall not be less than three millions of dollars nor more than twelve millions, in shares of one hundred dollars each, but if necessary to augment the capacity of said road, the capital may from time to time, by a vote of two-thirds of the stockholders, be increased to an amount not exceeding twenty millions of dollars, and each stockholder shall be entitled to one vote for each share of his stock.

5. The stockholders at their first meeting shall elect directors, who, a majority thereof being necessary for a quorum, shall elect a president (from their own body) and shall appoint all other officers and agents, make by-laws and transact all business necessary to promote the purposes of the corporation.

6. The president and directors may create indebtedness in the manner prescribed by the by-laws for the purchase of materials, the construction and equipment of said railroad and for all other necessary purposes.

7. The rate of charge by said company for passengers and freight

transported on the main line and branches of said railroad shall never exceed the highest allowed by law to other railroads in the state, and no discrimination shall be made in such charges against any connecting railroad or canal company chartered by the state, and no taxation upon the property of the said company shall be imposed by the state until the profits of said company shall amount to ten per cent. on the capital of the company.

8. If said company shall fail to commence work or put the road in operation within the time specified in the second section, then the franchise hereby granted shall revert to the state, and the commissioners hereinafter named shall take possession of the said road after serving due notice in writing to the president of said company, that said reversion and repossession is claimed.

9. George W. Summers, James Burley, Burton Despard, Joel McPherson and James O. Watson are hereby appointed commissioners to act on the part of the state of West Virginia, who shall act in conjunction with the commissioners appointed by the state of Virginia, whose duty it shall be to offer the benefits of this charter for the acceptance of capitalists, so as to secure the speediest and best construction, equipment and operation of said railroad. To this end they are empowered to make a contract with any parties who shall give the best terms and the most satisfactory assurances of capacity and responsibility, and to introduce into said contract any additional stipulations for the benefit of the state, and in furtherance of the purposes herein declared and not inconsistent with this act; which said contract shall be to all intents and purposes as much a part of this charter as if the same had been herein included at the time of the passage of this act. Provided, that no act of the said commissioners, whether acting by themselves or in conjunction with the commissioners appointed by the state of Virginia, shall be valid or effectual unless approved of or voted for by at least three of the commissioners appointed by this act.

10. The certificate of the said commissioners of the due execution of the said contract, and the organization of the said company, shall operate to confer upon said company all the benefits of this charter,

subject only to the provisions of the Code of Virginia, second edition, for the government of internal improvement companies, so far as the same may not be inconsistent herewith.

11. Should the forfeiture provided for in the eighth section occur, the said commissioners may make a new contract with any other parties as though no former contract had been made.

12. The said commissioners may receive from the treasury of the state their necessary expenses incurred in the execution of the duty herein imposed upon them, and shall not directly or indirectly receive any emolument from, or have any interest in any company created by this charter.

13. The Governor shall, upon the passage of this act, immediately communicate the same to the Governor of Virginia.

Chap. 131, *W. Va., Acts*, 1866.

CHAPTER 93.

AN ACT to provide for the completion of a line or lines of Railroad from the waters of the Chesapeake to the Ohio River.

Passed February 26, 1867.

Be it enacted by the Legislature of West Virginia:

1. That it shall be lawful for the Covington and Ohio Railroad Company, which may be organized under the act passed by the General Assembly of Virginia, on the twenty-sixth day of February, eighteen hundred and sixty-six, and the act passed by the Legislature of West Virginia, on the first day of March, eighteen hundred and sixty-six, entitled "An Act to incorporate the Covington and Ohio Railroad Company," to consolidate with the Virginia Central Railroad Company, with the West Virginia Central Railway Company, with the Southside Railroad Company, with the Norfolk and Petersburg Railroad Company, or with one or more of said Companies, upon such terms as may be agreed upon by the stockholders of the companies proposing to consolidate, in general meeting.

2. The companies which may consolidate under the provisions of this act shall constitute one corporation, which shall be vested with all the rights, privileges, franchises and property which may have been vested in either company prior to the act of consolidation, and shall be known as the Chesapeake and Ohio Railroad Company.

3. Should the consolidation of all the companies not be effected at the same time, it shall be lawful for the Chesapeake and Ohio Railroad Company, when formed by two or more companies, afterwards to consolidate in the remaining company or companies.

4. It shall be the duty of said company, within six years after its organization, to complete the railroad from Covington to the Ohio river, in a style and with grades and curves not inferior to those adopted by C. B. Fisk, Esq., late chief engineer, in his report and plans of said work; and they may select the mouth of Big Sandy river or the mouth of the Great Kanawha river as the Ohio terminus of their road, or may construct a branch of their road to both points, and may occupy the line of the West Virginia Central Railway Company, with its consent, from Charleston to the Ohio river, and upon terms to be agreed upon by said companies; and the said Chesapeake and Ohio Railroad Company shall have the right to construct an air line railroad from Richmond to Charlottesville, or to make such changes in that part of the Central Railroad which lies between said points as will shorten the same, and shall have all the powers conferred by the Code and laws of Virginia which may be necessary for this purpose.

5. Should the Southside Railroad Company and the Norfolk and Petersburg Railroad Company, or either of them, become consolidated with the Covington and Ohio Railroad Company, it shall be the duty of the consolidated company, within the time agreed upon in the terms for consolidation, to construct a railroad from the terminus of the Southside Railroad at Lynchburg to Covington, or a suitable point of connection on the Virginia Central Railroad; and said company shall be vested with all the powers conferred by the Code of Virginia to enable it to construct said railroad.

6. The state reserves the right to connect with the works of this company any other work of internal improvement, and no discrimination shall be made in the charges of said company against the trade and travel of any connecting work.

7. Said company may have a capital stock not exceeding thirty millions of dollars, to be divided into shares of one hundred dollars each, and may make a part thereof preferred stock, and may borrow such sums of money, at a rate of interest not exceeding eight per centum per annum, as may be necessary for the construction and proper equipment of its road, and execute liens upon its property and revenues to secure the payment of the interest and principal of the same.

8. It shall be lawful for said company to acquire not exceeding five millions of acres of land in payment for subscriptions of stock or by purchase; provided, however, it shall not be lawful for said company, at the expiration of ten years after the completion of their road, to hold more land than shall be necessary for the use of the road.

9. Said company may elect such number of directors and provide for the election or appointment of such officers and agents as it may decide to be necessary for the management of its affairs.

10. Each stockholder shall have one vote in the meetings of the stockholders, for every share of stock held by him.

11. Should a vacancy at any time occur in the board of commissioners of the Covington and Ohio Railroad from the death, resignation or disability to act, of any of its members, it shall be the duty of the Governor of the state in which such member resided to fill the vacancy by a new appointment.

12. It shall be lawful for the commissioners to cause books of subscription to the stock of the Covington and Ohio Railroad Company to be opened at such places and under the direction of such agents as they may appoint, with the view of organizing a company to accept the charter of the Covington and Ohio Railroad, and construct said railroad.

13. The said Chesapeake and Ohio Railroad Company shall have the right, at any time within two years after its organization, to purchase the stock held by the state of Virginia at the date of the purchase in said company, by transfering to the board of public works of Virginia, bonds of the state of Virginia for an amount equal to the stock proposed to be purchased, and also to pay any debt which it may owe to the state of Virginia at the date of the payment, on account of loans made to any of the companies which may have consolidated, by surrendering to the board of public works of Virginia, State bonds for an amount equal to the debts proposed to be paid, and may also purchase the right of the state of Virginia in and to the Blue Ridge Railroad by the surrender of State bonds to an amount equal to the value of said road at the time of purchase under the contract with the Virginia Central Railroad Company; said amount to be ascertained by the commissioners of the Covington and Ohio Railroad. It shall also be lawful for any stockholder in the Chesapeake and Ohio Railroad Company to purchase a part or the whole of the stock held by the state of Virginia at the time of the purchase, in the company of which he is a stockholder, by transferring to the board of public works of Virginia, State bonds equal in amount to the stock proposed to be purchased. But nothing in this act contained shall be held to bind the state of West Virginia for any part of the debts of Virginia.

14. The Virginia Central Railroad Company and the West Virginia Central Railway Company, or either of them may contract with the Covington and Ohio Railroad commissioners for the construction of the railroad from Covington to the Ohio river, and in the event such contract be made, the said Virginia Central Railroad Company or the West Virginia Central Railway Company, shall be known as the Chesapeake and Ohio Railroad Company and shall be entitled to all the benefits of the charter of the Covington and Ohio Railroad and to all the rights, interests and privileges which by this act are conferred upon the Chesapeake and Ohio Railroad Company when organized.

15. It shall be lawful for the board of supervisors of any county to take the sense of the qualified voters of their county upon the

question of subscription of the stock of any company which may be authorized to construct the railroad from Covington, in the state of Virginia, to the Ohio river, and, should three-fifths of the persons who may vote on such question, vote in favor of the proposed subscription, the said board of supervisors shall appoint an agent to subscribe for the amount of stock which may have been authorized by the vote of the county, and also an agent to negotiate a loan or loans in the name of the county, at a rate of interest not exceeding ten per cent. per annum, for the purpose of paying such subscription of stock, and said board of supervisors shall be authorized to issue the bonds, coupon or registered, of the county for the amount of such loans; and said board of supervisors shall from time to time, assess and collect taxes upon the taxable subjects of their county sufficient to pay the interest upon such loans and the final extinction of the principal thereof.

16. James Burley, Z. D. Ramsdell, Harrison Hagans, Joel McPherson and John S. Cunningham are hereby appointed commissioners on behalf of West Virginia, in lieu of the commissioners appointed by the act passed March first, eighteen hundred and sixty-six, entitled "An Act to incorporate the Covington and Ohio Railroad Company," with all the powers vested in the former commissioners by said act, and said commissioners may act conjointly with the commissioners of Virginia or may act separately, but no act of the said commissioners whether acting by themselves or in conjunction with the commissioners appointed by the state of Virginia shall be valid or effectual unless approved or voted for by at least three of the commissioners appointed by this act.

17. It shall be the duty of the company which may be formed under this act to file, within thirty days after their organization, with the board of public works of Virginia and West Virginia, a duly certified and correct copy of the terms of consolidation.

Chap. 93, *W. Va., Acts,* 1867.

AN ACT confirming and amending the charter of the Chesapeake and Ohio Railroad Company.

Passed January 26, 1870.

Be it enacted by the Legislature of West Virginia:

1. That the contract, dated August thirty-first, eighteen hundred

and sixty-eight, made by commissioners of Virginia and West Virginia, with the Virginia Central Railroad Company, by which the Chesapeake and Ohio Railroad Company was formed, and under which it has been organized, be and the same is hereby approved, ratified, and confirmed as follows:

Contract with Commissioners for completing the Covington and Ohio Railroad.

The parties to the contract are:

First. The commissioners of the state of Virginia, under the following acts of the General Assembly, viz: 1st, "An act to incorporate the Covington and Ohio Railroad Company," passed February twenty-sixth, eighteen hundred and sixty-six. 2nd, "An act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river," passed March first, eighteen hundred and sixty-seven.

Second. The commissioners of the state of West Virginia, under the following acts of the Legislature, viz: 1st, "An act to incorporate the Covington and Ohio Railroad Company," passed March first, eighteen hundred and sixty-six. 2nd, "An act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river," passed February twenty-sixth, eighteen hundred and sixty-seven. 3rd, "An act to amend and re-enact the fifteenth section of an act providing for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river, passed February twenty-sixth, eighteen hundred and sixty-seven," passed February sixth, eighteen hundred and sixty-eight.

Third. The Virginia Central Railroad Company:

The said commissioners of Virginia and West Virginia, by virtue of the authority given them by the statutes already referred to, and in order to secure the speediest and best construction, equipment, and operation of the said railroad from Covington to the Ohio river, according to the true intent and meaning of the said statutes, have contracted therefor with the said Virginia Central Railroad Company as the party giving the best terms and the most satisfactory

assurances of having the capital, capacity and responsibility contemplated and required by said statutes, and have introduced into the said contract the following additional stipulation, proposed by the stockholders of the said Virginia Central Railroad Company, in general meeting on the twenty-ninth day of November, eighteen hundred and sixty-seven, and accepted by the said commissioners as being for the benefit of their respective states and in furtherance of the purposes declared by the Legislature aforesaid, viz:

I. The work to be commenced and completed in the time and manner provided in the charter.

II. The company to guarantee four per cent. semi-annual dividends upon any stock which may be subscribed for the construction of said road, after the completion of the road to the Ohio river, and in the meantime said stock shall be preferred in any dividends which shall be declared by the company, to an extent not exceeding four per cent. semi-annually.

III. The company to borrow such sums of money at a rate of interest not exceeding eight per cent. per annum, as may be necessary, in addition to the funds arising from stock subscriptions for the completion of said road, and to execute a lien on its property and resources to secure the payment of the principal and interest of such loans: Provided, that subscriptions may be received to be applied to the construction of the work continuously from either end of the line.

IV. The company may gauarantee the paym nt of principal and interest of bonds of cities and counties, receivable in payment of subscription to stock.

V. That bonds of cities and counties at ninety cents on the dollar, and bearing eight per cent. per annum interest, convertible into preferred stock, be received in payment of subscription to stock.

VI. Nothing contained in any contract made by this company shall have the effect to deprive the present creditors of the company of their claims for satisfaction out of the present property of the company, and it shall be the duty of the president and directors, before executing any further lien on the present property of the company, to secure by mortgage any portion of the funded or float-

ing debt, not heretofore so received, that cannot be promptly paid off in the ordinary administration of the affairs of the company.

And the said Virginia Central Railroad Company having undertaken and contracted to construct the said railroad, on the terms and conditions aforesaid, it is hereby declared and certified that the said company shall hereafter be known as "The Chesapeake and Ohio Railroad Company," and is entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests, and privileges which, by the statutes aforesaid, are conferred upon the Chesapeake and Ohio Railroad Company, when organized.

In testimony whereof, the commissioners of Virginia and West Virginia have set their hands and seals; and the said Virginia Central Railroad Company has caused the corporate seal of the company to be affixed, with the signature of Edward Fontaine, president of said company, this thirty-first day of August, eighteen hundred and sixty-eight.

JOHN B. BALDWIN, [L. S.]
GEORGE W. BOLLING, [L. S.]
THOMAS S. FLOURNOY, [L. S.]
WM. J. ROBERTSON, [L. S.]
Commissioners of Virginia.

JAMES BURLEY, [L. S.]
Z. D. RAMSDELL. [L. S.]
JOEL McPHERSON, [L. S.]
JOHN S. CUNNINGHAM, [L. S.]
Commissioners of West Virginia.

E. FONTAINE,
President of the Virginia Central Railroad Company.

2. That the Chesapeake and Ohio Railroad Company, formed and organized under said contract, shall have all the rights, benefits and privileges, and be subject to all the duties and responsibilities provided and declared in the said contract, and in the Legislature of the states of Virginia and West Virginia, therein referred to; except only that the said company shall be allowed for the completion of the road from Charleston, in the county of Kanawha, to the

mouth of Sandy, in the county of Wayne, the same time that is given by the charter for completing the other portions of the work within this state.

3. That the general meetings of the said company may be held at any station upon the line of the road, and meetings of the directory at such places as the by-laws may prescribe.

4. That upon the completion of the road, if the said company shall not deem it expedient to establish its principal office within this state, its place of business at or nearest Charleston, in the county of Kanawha, shall, for all purposes required by law, be deemed to be such principal office within this state. And, until such completion, all notices and legal process shall be sufficiently served upon the company if delivered in person to the president, vice-president, or any director of the company, whether in this state or elsewhere.

Chap. 3, *W. Va., Acts,* 1870.

AN ACT reviving and amending the charter of the Chesapeake and Ohio Railroad Company.

[Passed February 20, 1877.]

WHEREAS, It is claimed by persons not in the interest of the Chesapeake and Ohio Railroad Company that the charter of said company has been forfeited by reason of the failure of said company to complete its railroad to the mouth of the Big Sandy river, in the county of Wayne, within the time required by its contract; and, whereas, it is not deemed expedient to enforce such forfeiture, if it has occurred as claimed; therefore,

Be it enacted by the Legislature of West Virginia:

1. That the Chesapeake and Ohio Railroad Company be, and the same is, hereby released from any forfeiture of its charter that may have occurred for the cause stated in the preamble, or for any other cause, and said charter shall be and remain in full force and effect to the same extent as if no such forfeiture had occurred, if, in fact, any such forfeiture has occurred. But the Legislature expressly reserves the right, by a general law applicable to all the railroads in the state, to regulate the charges for freights, and passengers transported over the railroad of the said company.

2. That subject to the provisions of the preceding section, the second section of the act passed January twenty-sixth, one thousand eight hundred and seventy, entitled "an act confirming and amending the charter of the Chesapeake and Ohio Railroad Company," be and the same is hereby amended and re-enacted so as to read as follows:

"2. That the Chesapeake and Ohio Railroad Company, formed and organized under said contract, shall have all the rights, benefits and privileges, and be subject to all the duties and responsibilities provided for and declared in the said contract, and in the legislation of the states of Virginia and West Virginia therein referred to, except only that the said company shall be allowed, for the completion of that part of its railroad from Huntington, in the county of Cabell, to Big Sandy river, in the county of Wayne, until the first day of January, one thousand eight hundred and eighty-two; and it shall be the duty of said company to so complete its said road within that period. *Provided*, That the terminus of said railroad on the Big Sandy river aforesaid, may be at any point thereon not above that at which its railroad bridge, across said river, has been located.

Chap. 18, *West Virginia Acts*, 1877.

AN ACT to amend and re-enact section seven of chapter one hundred and thirty-one of the Acts of one thousand eight hundred and sixty-six, entitled "An act to incorporate the Covington and Ohio Railroad Company, passed March first, one thousand eight hundred and sixty-six."

[Passed January 31, 1879.]

Be it enacted by the Legislature of West Virginia:

1. That section seven of chapter one hundred and thirty-one, of the Acts of one thousand eight hundred and sixty-six, entitled "An act to incorporate the Covington and Ohio Railroad Company, be and the same is hereby amended and re-enacted so as to read as follows:"

"7. The rate of charges by said company for passengers and freight transported on the main line and branches of said railroad shall never exceed the highest allowed by law to other railroads in the state, and no discrimination shall be made in such charges

by a railroad or other internal improvement company in this state, on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them, and recorded in the recorder's office of any county wherein the property so sold, or any part thereof, is situated, or where said conveyance is recorded.

2. The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges and perform all such duties as would have been had, or should have been performed by the first company, but for such sale and conveyance; save only that the corporation so created shall not be entitled to debts due to the first company, and shall not be liable for any debts of, or claims against, the said first company, which may not be expressly assumed in the contract of purchase; and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he, or his assigns, may create so many shares of stock therein as he or they may think proper, not exceeding, together, the amount of stock in the first company at the time of the sale, and assign the same in a book kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for four successive weeks in a newspaper printed in each county in the state wherein said corporation may do business.

3. The debts due to and by, and claims against, the said first company mentioned in the preceding section, shall be subject to the

provisions contained in the seventh section of chapter fifty-two, of the Code.

4. This Act shall not apply to any sales heretofore made, or any suits now pending in regard to such sales.

Chap. 70, *Acts, W. Va.*, 1871.

AN ACT relating to sales of the works and property of railroad and other internal improvement companies under decrees of a court.

[Passed February 20, 1877.]

Be it enacted by the Legislature of West Virginia:

That in all cases where a mortgage or deed of trust has been executed upon the works and property of a railroad company or other internal improvement company, the provisions of chapter seventy of the acts of one thousand eight hundred and seventy-one shall be applicable to a sale of said property made under a decree of a court having jurisdiction in the case, and the purchaser at such sale shall have all the rights and privileges and be subject to all the responsibilities provided for in said chapter.

Chap. 12, *Acts, West Virginia*, 1877.

AN ACT to provide for the improvement of the navigation of the Great Kanawha River.

10. The navigation, improvements and property of the company shall be exempt from taxation until the net income arising therefrom shall be six per centum per annum.

Chap. 109, *Sec.* 10, *Acts, W. Va.*, 1867.

AN ACT to incorpora e the Martinsburg and Potomac Railroad Company.

The said railroad and all the property, real and personal, connected therewith, or used in the construction thereof, and all of the stock, notes, bonds, and moneys belonging to said company, shall be free and exempt from all state, county, township and municipal taxation, until the said railroad is completed sufficiently for the transportation of freights or passengers, or some part thereof is completed and used for that purpose.

Chap. 32, *Sec.* 7, *Acts*, 1868.

AN ACT to incorporate the Greenbrier and Tygart's Valley Railroad Company.

The said railroad and all the property of the same, real and personal, connected therewith, or used in the construction thereof, and all of the stock, notes, bonds, and moneys belonging to said company shall be free and exempt from all state, county, township and municipal taxation, until the said railroad is completed sufficiently for the transportation of freight or passengers, or some part is completed and used for that purpose.

Chap. 117, *Sec.* 12, *Acts*, 1868. (*Extra Session.*)

AN ACT to incorporate the Shenandoah Navigation Company.

The said canals and works of the Shenandoah River Company, are hereby vested in the stockholders thereof as tenants in common, each stockholder's interest being in proportion to the amount of his stock, and the said improvements shall be deemed real estate and exempt from the payment of any tax.

Chap. 91, *Sec.* 9, *Acts*, 1869.

AN ACT to incorporate the Moorefield and South Branch Valley Railroad Company.

For the purpose of laying out and locating their said road and branches, the president and directors of said company, with their engineers and agents, shall have full power and authority to enter upon and pass through and over any lands on the contemplated route, and to occupy the same so long as may be necessary for locating said road. But the said company, in locating their said railroad, branches, depots and stations, shall not throw open any fences or enclosures on any land, or injure the property of the owner or occupier without consent, or invade the dwelling house of any person, or any space within sixty feet thereof, without his or her consent. And when the line of the said road is located, if the owners of said lands or their agents, and the officers and agents of said company cannot agree upon the value of such lands as said company may

deem necessary to use and occupy for their railroad, depots, ware houses and stations, the said company may have and hold the said lands for their use, in the manner following, to-wit: The said company shall make out a particular description of said lands in writing and file it in the office of the clerk of the circuit court of the county in which such lands are located, stating therein the sum they propose to pay therefor, and also file therewith a bond with security to the satisfaction of the judge of said court, conditioned to pay all that may be recovered against them as hereinafter provided, and thereupon they may enter upon and take possession of said lands, and proceed at once to operate and use the same for the purposes designated in said description, but in no case shall the amount of land for the track of said road exceed seventy feet in width, except in case of cuts and fills, when the width may be one hundred and eighty feet; and the party owning said land, or his or her agent, may file with the clerk of said court, his or her claim therefor, in which shall be stated the sum he or she may demand for said land, and the said court shall thereupon appoint five disinterested persons for the purpose of ascertaining a just compensation therefor, any three of whom may act; and no person shall be considered by said court a disinterested person, qualified for such purpose, through whose lands said road is to pass, and which is yet to be condemned or the price agreed upon; and the sheriff, after said appointment is made, shall summon the said owners to meet on said land at such time as he shall appoint, within thirty days after such viewers are appointed, having first given at least ten days notice to the parties interested. And the said sheriff shall administer an oath to said viewers, which he is hereby empowered to do, that they and each of them will fairly, impartially, and honestly fix and determine the amount the said railroad company shall pay for the use of the said land, and return their report in writing, under their hands and seals, setting forth the amount, if any, to be paid by said company; which report shall be certified by said sheriff to the court; and on the first day of the next term of said court, the judge thereof shall direct judgment to be entered upon said report, if no exceptions be taken and filed thereto by either party; but if exceptions be taken and filed, the court shall decide according to the evidence before it; and after

judgment is entered upon said report, the said company shall hold said land by a good, indefeasible title, subject only to the payment of said judgment. The judge shall have power to determine and order which party shall pay the costs of such proceedings; and said railroad company shall not be subject to taxation until the president and directors shall declare a dividend of six per centum per annum upon the capital stock of said company.

Chap. 100, *Sec.* 7, *Acts*, 1869.

AN ACT to provide for the Improvement of the Great Kanawha River.

The navigation improvements and property of the company shall be exempt from taxation until the net income arising therefrom shall be six per centum per annum.

Chap. 115, *Sec.* 9, *Acts*, 1869.

AN ACT to incorporate the New River Railroad Company.

The property of the said company shall be exempt from taxation until its net revenues may pay ten per cent. upon its capital stock.

Chap. 37, *Sec.* 10, *Acts*, 1870.

AN ACT for the extension of the Pittsburgh, Virginia, and Charleston Railroad across West Virginia.

5. The said company, which shall be known by the name and style of the Pittsburgh, Virginia and Charleston Railroad Company, shall be exempt from the imposition of any tax or burthen whatever, within this state, until the net earnings exceed ten per cent. upon the capital stock of said company.

Chap. 38, *Sec.* 5, *Acts*, 1870.

AN ACT to incorporate the Northern and Southern West Virginia Railroad Company.

9. The property of the said company shall be exempt from taxation until its net earnings exceed ten per cent. upon its capital stock.

Chap. 41, *Sec.* 9, *Acts*, 1870.

AN ACT concerning and authorizing the Alexandria, Loudoun and Hampshire Railroad Company to extend their railroad through this State to the Ohio River.

7. The said company shall be and is hereby invested with all and singular the rights, powers, immunities, franchises, and privileges, for surveying, locating, constructing and equipping said road, and working, repairing and preserving the same, and the necessary vehicles and appurtenances thereto belonging, for the safe and convenient transportation of freights and passengers thereon, and with the power and authority to charge and collect tolls on freights and passengers on the same, and every part thereof, which the Baltimore and Ohio Railroad Company enjoys under the act incorporating said company, and the act or acts supplementary and amendatory thereto; and said company shall be exempt from the imposition of any tax or burthen whatever within this state, until such time as the net proceeds of said road exceed ten per cent. upon the capital stock of said company.

Chap. 25, *Sec.* 7, *Acts*, 1870.

AN ACT to amend and renew the charter of the West Virginia Central Railway Company.

2. That the act passed March 3, 1868, "renewing the charter of the West Virginia Central Railway Company," be amended and re-enacted so as to read as follows:

"The charter of the West Virginia Central Railway Company having expired by limitation and the failure to make any valid organization under it, the same as since and now amended and limited as renewed and revived and with all the rights and franchises thereof, is hereby transferred to and placed under the control and direction of D. D. T. Farnsworth, Z. D. Ramsdell, J. C. McGrew, Spencer Dayton, and William B. Crane, who are hereby appointed commissioners on the part of the state, whose duty it shall be to offer the benefits of the said charter for the acceptance of capitalists, so as to secure the speediest and best construction, equipment and operation of said railway. To this end they are empowered to make a contract with any parties who shall give the best terms and the

most satisfactory assurance of capacity and responsibility; and to introduce into said contract any additional stipulations for the benefit of the state, and in furtherance of the purposes herein declared, and not inconsistent with this act, which said contract shall be to all intents and purposes as much a part of the charter as if the same had been herein included at the passage of this act. The said commissioners shall have authority in person, or by such agents as they may appoint, to receive subscriptions to the capital stock, and to superintend the organization of any company formed for the purpose of this act. And the certificate of the said commissioners filed with the secretary of the state, showing the organization of said company, and the execution of the contract herein provided for, shall confer upon said company all the benefits of this charter; and all the rights that are granted to the Chesapeake and Ohio railroad on the question of taxation shall also be granted to any company contracting under the provisions of this charter. No action of the said commissioners shall be valid unless concurred in by at least three of their number. They shall not directly or indirectly receive any emolument from, or have any interest in, any company created under this act, nor shall they receive from the state or from any other source any compensation for their services, or for any personal expenses incurred in the discharge of their duties under this act.

Chap. 22, *Sec.* 2, *Acts*, 1870.

AN ACT to incorporate the South Branch Railway Company.

5. The said company shall be, and is hereby, invested with all and singular the rights, powers, immunities, franchises, and privileges for surveying, locating, constructing, and equipping said road, and working, repairing, and preserving the same, and the necessary vehicles and appurtenances thereto belonging, for transportation of passengers and freight thereon, and such transportation of passengers and freight shall not exceed the rate of ten cents per mile of passengers, or of freight per ton. And said company is hereby exempted from state, county, or township taxation until the net profits of its road exceed ten per centum on the capital stock of said company.

Chap. 93, *Sec.* 5, *Acts*, 1871.

AN ACT to incorporate the Union and Greenbrier River Turnpike and Rai'road Company.

The property of said company shall be exempt from all taxation until its net earnings exceed ten per cent. of its capital stock.

Chap. 168, *Sec.* 8, *Acts*, 1871.

AN ACT to amend and re-enact an act passed February 24th, 1870, entitled "An act to incorporate the Northern and Southern West Virginia Railroad Company."

The property of the said company shall be exempt from taxation until its net earnings exceed ten per centum upon its capital stock.

Chap. 170, *Sec.* 9, *Acts*, 1871.

AN ACT to incorporate the Ohio River and Wayne County Mineral and Railway Company.

The said corporation shall have the rights and privileges and be subject to all the conditions and restrictions in the constitution and laws of this state in regard to surveying and laying out and acquiring the right of way for said railway and its branches.

The said corporation shall be exempt from taxation upon the actual cost of making and equipping the said railway until its income shall equal eight per centum upon that amount of capital, but upon no other or greater sum.

Chap. 172, *Sec.* 7, *Acts*, 1871.

AN ACT to incorporate the Weston and Clarksburg Railroad Company.

The property of said company shall be exempt from all taxation until its net earnings exceed eight per cent. of its capital stock; and in no event shall it be subject to township or town taxation.

Chap. 187, *Sec.* 9, *Acts*, 1871.

AN ACT to incorporate the Steer Creek Valley and Elk River Railroad Company.

The property of said company shall be exempt from taxation until its net revenue may pay eight per cent. upon its capital stock.

Chap. 188, *Sec.* 10, *Acts*, 1871.

AN ACT to incorporate the Buckhannon Mineral Railroad Company.

The said company may, and shall have full power and authority to locate, construct, equip and maintain any branch railroad or railroads, not exceeding fifteen miles in length, from any point on their said road to any coal or timber lands, saw mills, iron works, or other manufacturing establishments, owned, used, operated or worked by the said company, for their benefit and the purposes of said road; and all the rights that are granted to the Chesapeake and Ohio Railroad on the question of taxation, shall also be granted to any company contracting and constructing under the provisions of this charter.

Chap. 201, *Sec.* 7, *Acts*, 1871.

AN ACT providing for a charter for the Guyandotte and Ohio River Railroad and Mineral Company.

The lands of said company shall be subject to taxation, except such parts and parcels as may be actually needed and necessary for railroad purposes.

Chap. 113, *Sec.* 11, *Acts*, 1872.

The following bills were each read a first time and referred to the Committee on Banks and Corporations:

House Bill No. 127, "A bill reviving and amending the charter of the Chesapeake and Ohio Railroad Company."

Extract from Journal of W. Va., Senate, 1877, *Page* 180.

Mr. Ferguson, from the Committee on Banks and Corporations, reported back,

House Bill No. 127, "A bill reviving and amending the charter of the Chesapeake and Ohio Railroad Company,"

With the following amendments, recommending the passage of the bill as amended:

In section 1, line 1, after the word "that" strike out the words "the Chesapeake and Ohio Railroad Company," and insert the following:

"On condition said Chesapeake and Ohio Railroad Company shall

complete its road to the Big Sandy river, as hereinafter provided, the said company shall."

Section 2, line 16, strike out "1882," and insert in lieu thereof "1880."

Extract from Journal of W. Va., Senate, 1877, *Page* 190.

House Bill No. 127, "A bill reviving and amending the charter of the Chesapeake and Ohio Railroad Company,"

Was read a second time.

The first amendment of the Committee on Banks and Corporations was rejected.

On the adoption of the second amendment of the committee to the bill, Mr. Ferguson demanded the ayes and noes.

The demand being sustained they were ordered and taken and the amendment rejected.

The ayes were:

Messrs. Arnett, (President,) Burdett, Caldwell, Ferguson, Johnson, Lowe, Pugh and Turner—8.

The noes were:

Messrs. Adams, Berkshire, Clayton, Dennis, Ferrell, Goff, Grantham, Jones, Loomis and Pugh—9.

Messrs. Baxter, Butler, Kirtley, McGinnis, Newlon, Scott and Tarr not voting.

Mr. Ferguson offered the following amendment:

Strike out all after the title of the bill down to the second section, and insert in lieu thereof the following:

Be it enacted by the Legislature of West Virginia:

1. That the second section of an Act passed January 26, 1870, entitled "An Act confirming and amending the charter of the Chesapeake and Ohio Railroad Company," be and the same is hereby amended so as to read as follows:

"That on condition said Chesapeake and Ohio Railroad Company shall complete its road to Big Sandy river, as hereinafter provided."

Pending the consideration of the amendment,

On motion of Mr. Burdett, at 6 o'clock P. M. the Senate adjourned.

Extract from Journal of W. Va., Senate, 1877, *Page* 208–9.

House Bill No. 127, "A bill reviving and amending the charter of the Chesapeake and Ohio railroad company,"

Coming up as unfinished business, the pending amendment was withdrawn by the consent of the Senate.

Mr. Ferguson moved to amend the bill in section 2, lines 11 and 12, by striking out the words "except only," that the said company shall be allowed for the completion, and insert in lieu thereof the following: "But upon the express condition that the said company shall complete," and upon that motion demanded the ayes and noes; the demand being sustained, they were ordered and taken and the amendment rejected.

The ayes were:

Messrs. Arnett (President,) Adams, Caldwell, Ferguson, Johnson, Lowe, Newlon, Pugh, Tarr and Turner—10.

The noes were:

Messrs. Baxter, Berkshire, Burdett, Clayton, Dennis, Ferrell, Goff, Grantham, Jones, Kirtley, Loomis and Scott—12.

Messrs. Butler and McGinnis not voting.

Mr. Ferguson offered the following amendment:

"Provided, further, that said railroad hereafter in each and every year shall be assessed and pay all state, school and other taxes levied by the state, and also all county and district taxes levied in the counties through which said railroad runs, under the provisions of the laws of this state for the assessment and collection of railroad taxes."

Pending the consideration of the amendment, the hour of 11 o'clock A. M. having arrived.

Extract from Journal of W. Va., Senate, 1877, *Page* 209–10.

House Bill No. 127, "A bill reviving and amending the charter of the Chesapeake and Ohio railroad company,"

Was then resumed.

On the adoption of the pending amendment, Mr. Ferguson demanded the ayes and noes.

The demand being sustained, they were ordered and taken, and the amendment rejected.

The ayes were:

Messrs. Ferguson, Goff, Grantham, Tarr and Turner—5.

The noes were:

Messrs. Arnett, (President,) Adams, Baxter, Berkshire, Clayton, Dennis; Ferrell, Johnson, Jones, Kirtley, Loomis, Lowe, Newlon, Pugh and Scott—15.

Messrs. Burdett, Butler, Caldwell and McGinnis not voting.

Extract from Journal of W. Va., Senate, 1877, *Page* 210.

The assessment of taxes is a matter so important to the citizen, that the law prescribing the subjects and mode of taxation, should receive the most careful attention, and should be concise and so clear that all doubts as to its construction would be excluded.

The law of assessment Chapter 54, Acts of 1875, could with advantage, be thoroughly revised, yet if it should not be deemed advisable at this time to undertake the revision of the entire law, there are still some of its provisions which demand, in justice to all tax-payers, immediate attention.

The Constitution requires that taxation shall be equal and uniform throughout the state, and that all property, both real and personal; shall be taxed in proportion to its value, to be ascertained as directed by law, and that no one species of property shall be taxed higher than any other species of property of equal value, and permits the Legislature to exempt from taxation that property only which is used for educational, literary, scientific, religious or charitable purposes, cemeteries and public property. Section 46 of the Acts to which I have referred, in addition to these classes of property, has also exempted from taxation agricultural productions grown directly from the soil, and the products and increase in number of live stock produced within the state during the year preceding the first day of February, and remaining unsold on that day in the possession of the original owner or his agent,—the produce during the same time of mines, salt wells, and oil wells, remaining unsold in the hands of the producer or his agent, on the first day of February; and all manufactured articles and products of mechanical skill and labor produced in the state during the same time, and remaining unsold

on the first day of February, in the hands of the producer or his agent.

This provision thus in violation of the fundamental law of the state, relieves from taxation a vast amount of property in the hands, for the most part, of wealthy farmers, graziers and manufacturers, who are most able to bear the burdens of taxation, and increases the taxes of the less wealthy and laboring classes. This Act should be amended and made to conform to the Constitution.

Extract from Message of Gov. H. M. Mathews, in 1879. *Senate Journal* (*W. Va.,*) 1879, *Page* 19, 20.

AN ACT

To authorize the Board of Public Works to Construct a Railroad from Covington to the Ohio River on State account.

[Passed February 15, 1853.]

1. *Be it enacted by the General Assembly*, That for the purpose hereinafter named, the Board of Public Works be and they are hereby incorporated and made a body politic, under the name of "The Covington and Ohio Railroad Company," with all the powers conferred by the Code of Virginia upon the Board of Public Works when they are required to cause works of internal improvement to be constructed on State account, and with such additional powers and privileges, and subject to such restrictions as are set forth in said Code in respect to companies incorporated to construct railroads.

2. That said Company shall cause to be constructed and equipped a railroad with a heavy rail from some point at or near Covington or Clifton Forge, in the county of Alleghany, by the best practicable route, to some point on the Ohio river, not below the mouth of Big Sandy river, nor above the town of Point Pleasant.

3. That in the construction of this railroad the Board of Public Works shall commence and continue the construction of said road from its western terminus east at the same time they are extending the said road from its eastern terminus west.

4. That the Board of Public Works are hereby authorized to borrow, on the credit of the Commonwealth, in the mode prescribed by existing laws, the money necessary to construct and equip said road, but no more than one million of dollars are hereby appropriated for the purposes of this act.

5. That in constructing said road said Company shall not interfere with the route or track for its canal which the James River and Kanawha Company may within six months after the passage of this act designate by location, but said Covington and Ohio Company may, before the expiration of said six months, proceed to locate and construct said road, with the consent of the stockholders of the James River and Kanawha Company first had and obtained: *Pro-*

vided, That six months notice shall be given to the James River and Kanawha Company before proceeding to locate each successive section of fifty miles.

6. This act shall be in force from its passage.

AN ACT

To Incorporate the Covington and Ohio Railroad Company.

[Passed February 26, 1866.]

1. *Be it enacted by the General Assembly of Virginia*, That the persons upon whom the benefits of this charter may be hereafter conferred, and who may be organized as hereinafter provided, shall thereupon be constituted a corporation, under the name and style of "The Covington and Ohio Railroad Company," according to the provisions of the Code of Virginia, edition 1860, for the government of incorporated companies, and not inconsistent herewith.

2. The said Covington and Ohio Railroad Company, when fully constituted and certified as hereinafter provided, shall have all the rights, interests and privileges, of whatsoever kind, in and to the Covington and Ohio Railroad and appurtenances thereto belonging, now the property of the State of Virginia, upon condition that it shall, within six months after its incorporation, as provided in the tenth section of this act, commence, and within six years complete, equip and operate a railroad from some point at or near Covington, Alleghany county, Virginia, and connecting with the Virginia Central Railroad by the way of the White Sulphur Springs, and the valleys of the Greenbrier river, New river and Kanawha river, to a point at or near the mouth of Scary creek, and thence to the Ohio river. The said road to be constructed in a style at least equal to that of the Virginia Central Railroad, and with grades not higher than those adopted by C. B. Fisk, Esqr., the former engineer of the Covington and Ohio Railroad. But this grant is not intended to include the unexpended amount heretofore appropriated by the State of Virginia to this work.

3. The said Covington and Ohio Railroad Company shall have the right to construct a branch from its main line to connect with

the Virginia and Tennessee Railroad at such points as it may deem most expedient, and the said Company is hereby empowered to acquire real property necessary for the construction of the said railroad and of the said branch.

4. The capital stock of the Company shall not be less than $3,000,000, nor more than $12,000,000, in shares of one hundred dollars each: but, if necessary to augment the capacity of said road, the capital may, from time to time, by a vote of two-thirds of the stockholders, be increased to an amount not exceeding twenty millions of dollars, and each stockholder shall be entitled to one vote for each share of his stock.

5. The stockholders, at their first meeting, shall elect Directors, who, a majority thereof being necessary for a quorum, shall elect a President, (from their own body,) and shall appoint all other officers and agents, make by-laws and transact all business necessary to promote the purposes of the corporation.

6. The President and Directors may create indebtedness in the manner prescribed by the by-laws for the purchase of materials, the construction and equipment of said railroad, and for all other necessary purposes.

7. The rates of charge by said Company for passengers and freight transported on the main line and branches of said railroad shall never exceed the highest allowed by law to other railroads in the State of Virginia, and no discrimination shall be made in such charges against any connecting railroad or canal company in which the State has an interest; and the right is reserved to the State of Virginia to connect at any point within its limits, with said railroad, or any of its branches, any canal or railroad in which the State has an interest; and no taxation upon the property of said Company shall be imposed by the State until the profit of the Company shall amount to ten per cent. a year on its capital.

8. If said Company shall fail to commence work, or to put the road in operation within the time specified in the charter, then the franchise hereby granted shall revert to the State of Virginia, and the commissioners hereinafter named shall take possession of the said road, after serving due notice in writing, on the President of said Company, that the said reversion and repossession is claimed.

9. John B. Baldwin, George W. Bolling, Thomas S. Flournoy, R. H. Maury and William J. Robertson, are hereby appointed commissioners to act on the part of the State of Virginia; but should a like number be appointed by the State of West Virginia, then, (in that case,) to act in conjunction with the same, whose duty it shall be to offer the benefits of this charter for the acceptance of capitalists, so as to secure the speediest and best construction, equipment and operation of said railroad: to this end they are hereby empowered to make a contract with any parties who shall give the best terms and the most satisfactory assurances of capacity and responsibility, and to introduce into said contract any additional stipulations for the benefit of the State and in furtherance of the purposes herein declared, and not inconsistent with this act; which said contract shall be, to all intents and purposes, as much a part of this charter as if the same had been herein included at the time of the passage of this act: *Provided*, That no act of the said commissioners, whether acting by themselves or in conjunction with commissioners to be appointed by the State of West Virginia, shall be valid or effectual unless approved and voted for by at least three of the commissioners appointed by this act.

10. The certificate of the said commissioners of the due execution of the said contract, and the organization of the said Company, shall operate to confer upon the said Company all the benefits of this charter, subject only to the general provisions of the Code of Virginia for the government of internal improvement companies, so far as the same may not be inconsistent herewith.

11. Should the forfeiture provided for in the eighth section occur, the said commissioners may make a new contract with any other parties as though no former contract had been made.

12. The said commissioners may receive from the treasury of the State their necessary expenses incurred in the execution of the duty herein imposed upon them; and shall not, directly or indirectly, receive any emolument from, or have any interest in, any company created by this charter.

13. The Governor of the Commonwealth shall, upon the passage of this act, immediately communicate the same to the Governor of West Virginia and respectfully request that it be submitted to the

Legislature of that State for such action as it may deem necessary to carry out the objects and purposes of this act.

11. This act shall be in force from the day of its passage, and that the act passed February 13, 1862, at Wheeling, entitled "An act to incorporate the Charleston and Winchester Railroad Company," be and the same is hereby repealed.

AN ACT To Provide for the Completion of a Line or Lines of Railroad from the Waters of the Chesapeake to the Ohio River.

[Passed March 1, 1867.]

1. *Be it enacted by the General Assembly*, That it shall be lawful for the Covington and Ohio Railroad Company, which may be organized under the act passed by the General Assembly of Virginia on the 26th of February, 1866, and the act passed by the Legislature of West Virginia on the 1st day of March, 1866, entitled an act to incorporate the Covington and Ohio Railroad Company, to consolidate with the Virginia Central Railroad Company, with the South-side Railroad Company, with the Norfolk and Petersburg Railroad Company, or with one or more of said companies, upon such terms as may be agreed upon by the stockholders of the companies proposing to consolidate, in general meeting.

2. The companies which may consolidate under the provisions of this act, shall constitute one corporation, which shall be vested with all the rights, privileges, franchises and property which may have been vested in either company prior to the act of consolidation, and shall be known as the Chesapeake and Ohio Railroad Company.

3. Should the consolidation of all the companies not be effected at the same time, it shall be lawful for the Chesapeake and Ohio Railroad Company, when formed by two or more of said companies, afterwards to consolidate with the remaining company or companies.

4. It shall be the duty of said Company, within six years after its organization, to complete the railroad from Covington to the Ohio river, in a style and with grades and curves not inferior to those adopted by C. B. Fisk, Esq., late chief engineer, in his report and

plans of said work; and they may select the mouth of Big Sandy river or the mouth of the Great Kanawha river as the Ohio terminus of their road, or may construct a branch of their road to both points; and may occupy the line of the West Virginia Centr l Railroad Company, from Charleston to the Ohio river, upon terms to be agreed upon by said companies; and the said Chesapeake and Ohio Railroad Company shall have the right to construct an air line railroad from Richmond to Charlottesville, or to make such changes in that part of the Central Railroad which lies between said points as will shorten the same, and shall have all the powers conferred by the Code and laws of Virginia which may be necessary for this purpose.

5. Should the Southside Railroad Company and the Norfolk and Petersburg Railroad Company, or either of them, become consolidated with the Covington and Ohio Railroad Company, it shall be the duty of the consolidated company, within the time agreed upon in the terms of consolidation, to construct a railroad from the terminus of the Southside Railroad at Lynchburg to Covington, or a suitable point of connection on the Virginia Central Railroad; and said Company shall be vested with all the powers conferred by the Code of Virginia to enable it to construct said railroad.

6. Should the Chesapeake and Ohio Railroad Company refuse to consolidate with the Norfolk and Petersburg Railroad Company, and the Southside Railroad Company, on application, it shall be lawful for the Norfolk and Petersburg Railroad Company and the Southside Railroad Company to consolidate upon such terms as may be agreed upon by the stockholders of said companies, and the consolidated company shall be known by the name of the Norfolk, Petersburg and Covington Railroad Company, and shall be vested with all the rights, interest, franchises and property which belonged to either company prior to the act of consolidation, and shall be authorized to extend their road from Lynchburg to Covington, or a suitable point of connection on the Virginia Central Railroad, and shall have all the powers conferred by the Code and the laws of Virginia to enable it to construct said railroad; and said Company may have a capital stock not exceeding fifteen millions of dollars, to be divided into shares of one hundred dollars each, and may

make a part thereof preferred stock, and may borrow such sums of money as may be necessary, and execute liens upon its property and revenues to secure the payment of the interest and principal of the same; and it shall be the duty of said Company, within six years after its organization, to complete said railroad. The Chesapeake and Ohio Railroad Company, and the Norfolk, Petersburg and Covington Railroad Company, shall mutually furnish every facility for the transportation over their roads of tonage and passengers coming from the road of one Company to the road of the other Company, and there shall be no manner of discrimination against trade and travel passing from the road of one of said companies to the road of the other Company.

7. The state reserves the right to connect with the works of this Company any other work of internal improvement, and no discrimination shall be made in the charges of said Company against the trade and travel of any connecting work.

8. Said Company may have a capital stock, not exceeding thirty millions of dollars, to be divided into shares of one hundred dollars each, and may make a part thereof preferred stock; and may borrow such sums of money, at a rate of interest not exceeding eight per centum per annum, as may be necessary for the construction and proper equipment of its road, and execute liens upon its property and revenues to secure the payment of the interest and principal of the same.

9. It shall be lawful for said Company to acquire, not exceeding five millions of acres of land, in payment for subscriptions of stock or by purchase: *Provided, however*, it shall not be lawful for said Company, at the expiration of ten years after the completion of their road, to hold more land than shall be necessary for the use of the road.

10. Said Company may elect such number of directors, and provide for the election or appointment of such officers and agents as it may decide to be necessary for the management of its affairs.

11. Each stockholder shall have one vote in the meetings of the stockholders for every share of stock held by him.

12. Should a vacancy at any time occur in the Board of Commissioners of the Covington and Ohio railroad from the death, res-

ignation, or disability to act of any of its members, it shall be the duty of the Governor of the State in which such member resided, to fill the vacancy by a new appointment.

13. It shall be lawful for the commissioners to cause books of subscription to the stock of the Covington and Ohio Railroad Company to be opened at such places and under the direction of such agents as they may appoint, with the view of organizing a company to accept the charter of the Covington and Ohio railroad and construct said railroad.

14. The said Chesapeake and Ohio Railroad Company shall have the right, at any time within two years after its organization, to purchase the stock held by the State in said Company at the date of the purchase, by transfering to the Board of Public Works bonds of the State for an amount equal to the stock proposed to be purchased, and also to pay any debt which it may owe the State at the date of the payment, on account of loans made to any of the companies which may have consolidated, by surrendering to the Board of Public Works State bonds for an amount equal to the debt proposed to be paid, and may also purchase the right of the State in and to the Blue Ridge railroad, by the surrender of State bonds to an amount equal to the value of said road at the time of purchase under the contract with the Virginia Central Railroad Company, said amount to be ascertained by the commissioners of the Covington and Ohio Railroad; and should the Norfolk, Petersburg and Covington Railroad Company be organized, it may, within two years after its organization, purchase any stock held by the State therein at the date of purchase, by the surrender of State bonds for an amount equal to the stock proposed to be purchased, and may pay any debt due the State on account of loans made to the companies composing it by a surrender of State bonds for an amount equal to the debt proposed to be paid. The stock which may be purchased from the State by either of said companies shall be cancelled. It shall also be lawful for any stockholder in either the Chesapeake and Ohio Railroad Company, or the Norfolk, Petersburg and Covington Railroad Company, to purchase a part or the whole of the stock held by the State at the time of the purchase, in the company of which he is a stockholder, by transfering to the

Board of Public Works State bonds equal in amount to the stock proposed to be purchased.

15. The Virginia Central Railroad Company may contract with the Covington and Ohio Railroad commissioners for the construction of the railroad from Covington to the Ohio river; and in the event such contract be made, the said Virginia Central Railroad Company shall be known as "The Chesapeake and Ohio Railroad Company," and shall be entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests and privileges which by this act are conferred upon the Chesapeake and Ohio Railroad Company when organized.

16. It shall be the duty of the company or companies which may be formed under this act, to file within thirty days after their organization with the Board of Public Works of Virginia and West Virginia a duly certified and correct copy of the terms of consolidation.

17. It shall be the duty of the Governor to communicate a copy of this act to the Governor of West Virginia with the request that it be laid before the Legislature of said State, in order that such concurrent legislation may be had on the part of that State as may be necessary.

18. This act shall be in force from its passage.

A copy from the rolls—Teste:

J. BELL RIGGER,
C. H. D. and K. of R. of Va.

[No. 20.] Joint Resolution asking Congress to aid in the completion of the Chesapeake and Ohio Railroad.

WHEREAS, The State of Virginia, soon after the organization of the Government of the United States, in a spirit of unselfishness and liberality, characteristic of the early days of the Republic, did cede and donate to the Federal Government the North-west Territory, now comprising the States of Ohio, Indiana, Illinois, Michigan and Wisconsin; and whereas, under the fostering care of the General Government said territory has grown in all the elements of power

and civilization, so as now to form the five great States of the Union, unequaled for the education, activity and enterprise of their people, unsurpassed in an intelligent cultivation and development of their fertile lands and great natural resources, and affording to millions of free people happy homes, prosperity and wealth; and whereas, in the opinion of this Legislature, these grand results have, to a great extent, been produced by a wise and liberal donation of the lands of said territory and their products to the purposes of free education, to the securing of homes to the people, and especially to the soldiers of the republic, and to the construction of roads, railroads and canals, thus magnificently using and employing a princely gift.

Now, therefore, the Legislature of the State of West Virginia, in view of the foregoing facts respectfully present to the Congress of the United States the following statement and resolutions:

That there has been recently organized, by the joint and concurring authority of the States of Virginia and West Virginia, a company called "The Chesapeake and Ohio Railroad Company," for the construction of a railroad from the waters of the Chesapeake Bay to those of the Ohio river;

That it has been demonstrated by actual survey and engineering examination, that the said line of railroad, when constructed, will excel all other lines of communication between the great Northwest and the Atlantic coast in easy grades, its central position, the favorable climate which it traverses, and in shortness of distance;

That it will afford to the whole Northwest and West, and especially in its connection with the great Pacific roads now under construction, and the objects of such beneficent aid by Congress, the shorest, cheapest and most desirable route to the Atlantic coast;

That it has been further proven, by geological and scientific explorations, that said railroad will pass through a country richer perhaps in the deposits of those elements of national wealth and strength, coal and iron combined, than any land now known or accessible;

That said railroad, from its central position, its favorable location as to climate, distance and grade, will be of incalculable advantage to the General Government in its military necessities, either in time of peace or war;

And the Legislature of West Virginia desires further to state, that whilst her citizens, in their corporate capacities, have exhibited by their action a most commendable appreciation of the value of this railroad to themselves, as well as to the nation, yet so great have been the losses and devastations which they have incurred and suffered during the late war, in endeavoring to sustain the union of the States and their own Government, they have exhausted all their material aid to this great work; and they further express their belief, more in sorrow than in anger, that their mother State, Virginia, and her citizens, labor under the same inability, from her efforts and zeal in a mistaken cause, and therefore the people immediately interested, are unable to raise the funds necessary to complete said work on a plan commensurate with the wants of the country; therefore

Resolved by the Legislature of West Virginia,

1. That it would be manifestly just and right, that the Congress of the United States, in view of the facts hereinbefore set out, mindful of the generous action of Virginia in her donation of the Northwest territory, and recurring with pride to the results that have followed a liberal and wise donation of her wealth, should grant to the said Chesapeake and Ohio Railroad Company such material aid as in their wisdom may be effective and appropriate.

2. That our Senators in Congress be instructed and our Representatives requested to present this preamble, statement and resolutions to that body, and endeavor by all fair and honorable means to obtain such aid, and in doing so, to concede to the General Government such rights, in time of war or peace, for transportation of military supplies and mail and telegraphic facilities as may be just.

3. That the Governor be requested to transmit copies of the foregoing resolutions to the Governors of the western and north-western States, with the request that they be laid before the Legislatures of their respective States; and to the mayors of Cincinnati, Louisville, Memphis, Chicago and Saint Louis, with the request that they be communicated to the Boards of Trade of their respective cities.

ADOPTED, November 14, 1868.

PROPERTY EXEMPT FROM TAXATION.

43. All property, real or personal, described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say:

Property belonging to the United States, or which by the laws of the United States is exempt from taxation by or under state authority;

Property belonging exclusively to the State;

Property belonging exclusively to any county, district, city, village or town in this State, and used for public purposes;

Property used exclusively for divine worship; parsonages, and the household goods and furniture pertaining thereto; burial grounds;

Property belonging to colleges, academies and free schools, if used for educational purposes, including books, apparatus, annuities, money and furniture;

Public and family libraries;

Property used for public and charitable purposes, and not held or leased out for profit, including the property of agricultural associations;

Property belonging to any public institution for the education of the deaf, dumb or blind; or to any hospital, house of refuge, lunatic or orphan asylum; to the overseers of the poor in their official capacity; fire engines and implements for the extinguishment of fire, and property used exclusively for the safe keeping thereof, and for the meetings of fire companies;

Agricultural productions grown directly from the soil, and the products and increase in number of live stock produced within this State during the year preceding the first day of February, and remaining unsold on that day in the possession of the original owner or his agent;

The produce during the same time of mines, salt wells, and oil wells within this State, remaining unsold in the hands of the producer or his agent, on the first day of February; And all manufactured articles and products of mechanical skill and labor, produced in this State during the same time, and remaining unsold on the first day of February in the hands of the producer or his agent.

CHAP. 66.—An ACT to dispense with the assessment o back Taxes in certain Counties.

Passed February 24, 1866.

Be it enacted by the Legislature of West Virginia:

1. In any county where the taxes on persons and property, either real or personal, have not been assessed, and the assessment returned to the auditor's office, for any year or years, from eighteen hundred and sixty-one to eighteen hundred and sixty-four, inclusive, the assessor or assessors, of such county are hereby released from the duties imposed by the provisions of section seventy-seven of chapter one hundred and eighteen of the acts of eighteen hundred and sixty-three, as to the assessment of back taxes for any of said years; except that the land of all non-residents, which is situated in any such county shall be assessed.

2. All persons and property, either real or personal, are hereby released from all liability for the taxes of eighteen hundred and sixty-one to eighteen hundred and sixty-four inclusive, in any county where the same have not been assessed, or having been assessed, where the assessment of the same has not been returned to the auditor's office: Provided, however, that lands owned by non-residents of the state shall not be exempted from taxation.

Extract from Report of Special Committee of the Senate of West Virginia, made February 10th, 1883.

" * * * Your committee believe that if the large amount of property which is now improperly exempted from taxation by law, and which is liable to taxation under the Constitution, were subjected to taxation, it would produce a large increase in the revenue. The increased taxes arising from these two sources, in addition to those arising from other sources of revenue, would probably be sufficient to pay off the deficiency of $140,000 above-mentioned in three or four years.

" It is provided by section 1, article 10, of the Constitution that 'taxation shall be equal and uniform throughout the State, and *all property, both real and personal, shall be taxed in proportion to its value*, to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious, or charitable purposes, all cemeteries and public property, may by law be exempted from taxation.' The true construction of this provision of the Constitution is, that no property, except what is embraced in the classes therein expressly named, can be by law exempted from taxation; that the Legislature has no power to exempt from taxation any property of any kind, unless it comes within some one of the exempted cases.

Section 43, chapter 12, of the Acts of 1881 attempts to exempt from taxation, besides property properly exempt, public and family libraries, the property of agricultural associations, agricultural productions grown directly from the soil, and the products and increase in number of live-stock produced within this State during the year preceding the first day of January, and remaining unsold on that day in the possession of the original owner or his agent; the produce during the same time of mines, salt-wells, and oil-wells within this State remaining unsold in the hands of the producer or his agent on the first day of January; and all manufactured articles and products of mechanical skill and labor produced in this State during the same time and remaining unsold on the first day of January in the hands of the producer or his agent.

"Your committee are of opinion that the Legislature has no power to exempt any of the above-enumerated classes of property from taxation, and recommend that said section 43, of chapter 12, Acts of 1881, be amended and re-enacted so as to make it conform to the Constitution; and they have prepared a bill for that purpose, which they respectfully return herewith and recommend its passage."

West Va. Senate Journal, 1883, pages 156, 157.

SENATE BILL No. 88.

A BILL to amend and re-enact section forty-three of chapter twenty-nine of the Code of West Virginia, as amended and re-enacted by chapter twelve of the acts of 1881, concerning assessment of taxes.

Be it enacted by the Legislature of West Virginia, That section forty-three of chapter twenty-nine of the Code of West Virginia, as amended and re-enacted by chapter twelve of the Acts of 1881, be amended and re-enacted so as to read as follows:

43. All property, real and personal, described in this section, and to the extent herein limited, shall be exempt from taxation; that is to say, property belonging to the United States, or which, by the laws of the United States, is exempt from taxation, by or under State authority; property belonging exclusively to the State; property belonging exclusively to any county, district, city, village, or town in this State, and used for public purposes; property used exclusively for divine worship, parsonages, and the household goods and furniture pertaining thereto; burial grounds; property belonging to colleges, academies, and free shools, if used for educational purposes, including books, apparatus, annuities, money, and furniture; property held for public and charitable purposes, and not held or leased for profit; property belonging to any public institution for the education of the deaf, dumb, and blind, or to any hospital, house of refuge, lunatic or orphan asylum; to the county courts in their corporate capacity; fire engines and implements for the extinguishing of fire belonging exclusively to any city, town, or village in this State, and property used exclusively for the safe-keeping thereof, and property belonging to any city, town, or village in this State used exclusively for the meeting of fire companies. But no property

shall be exempt from taxation which shall have been purchased or procured for the purpose of evading taxation, whether by temporarily holding the same over the first day of January, or otherwise; whether the same be in this State or elsewhere.

West Va. Senate Journal, 1883—Appendix.

In the Senate of West Virginia, February 19th, 1883.

On motion of Mr. Byrne, the rules were suspended and Senate bill No. 88—"A bill to amend and re-enact section 43 of chapter 29 of the Code of West Virginia, as amended and re-enacted by chapter 12 of the Acts of 1881, concerning assessment of taxes"—was taken up for consideration and read a second time.

On motion of Mr. Price, the bill was amended, in line 19, by inserting after the word "thereof" the words "and belonging to any such city, town, or village."

Mr. Smith (of Tyler) moved to amend the bill, in line 21, by inserting after the word "companies" the following:

"Agricultural productions grown directly from the soil, and the products and increase in number of live-stock produced within this State during the year preceding the 1st day of January, and remaining unsold on that day in possession of the original owner or agent."

Mr. Floyd moved that the bill be indefinitely postponed. On that motion Mr. Byrne demanded the ayes and noes; and the demand being sustained, they were ordered and taken, as follows:

The ayes were:

Messrs. Farnsworth (president), Burgess, Coburn, Davidson, Dawson, Donehoo, Floyd, Harvey, Hays, Melvin, Roberts, Samples, Scott, Smith (of Marion), Smith (of Tyler), Stollings, and Woodyard—17.

The noes were:

Messrs. Byrne, Lobban, Maxwell, McNeel, Price, and Vanmeter—6.

Messrs. Barbee, Hostutler, and McGrew not voting.

So the motion prevailed.

See West Virginia Senate Journal, 1883, page 236.

OFFICE SUPREME COURT U. S.
FILED.
JAN 27 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM 1884.

No. 203.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOSEPH S. MILLER, Auditor of the State of
West Virginia.

IN ERROR TO THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA.

BRIEF OF

CORNELIUS C. WATTS,

Attorney-General of West Virginia.
Counsel for Defendant in Error.

THOMAS McGILL & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term 1884.—No. 203.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,

vs.

JOSEPH S. MILLER, Auditor of the State of West Virginia.

In Error to the Supreme Court of Appeals of the State of West Virginia.

Brief of Cornelius C. Watts, Attorney-General of West Virginia, Counsel for Defendant in Error.

In this case the plaintiff in error claims to be aggrieved by the decision and final decree rendered herein on the 22d day of April, 1882, by the Supreme Court of Appeals of the State of West Virginia, and claims that by said decree validity was given to two certain acts passed by the Legislature of West Virginia on the 4th day of February, 1879, and 7th day of March, 1879, respectively, which said acts, it claims, impaired the obligation of a contract made between the States of West Virginia and Virginia and the Chesapeake and Ohio Railway Company, as claimed by plaintiff in error, and to the benefit of which contract, it claims, the Chesapeake and Ohio Railway Company is entitled.

That portion of the act of March 7th, 1879, above referred to, which is material, is as follows:

"*An Act Concerning the Assessment of Taxes.*

"*Be it enacted by the Legislature of West Virginia:*

"SECTION 1. That chapter twenty-nine of the code as amended by chapter 54 of the acts of one thousand eight hundred and seventy-five, be amended and re-enacted so as to read as follows:

"SECTION 67. The president, secretary, or principal accounting officer of every railroad company, whether deriving its corporate powers exclusively from the State or not, shall list for taxation at its true value in money, verified by the oath or affirmation of the officers so listing, all the property, money, credits, and investments of such company of whatsoever kind, wholly held or used in this State and also the proportional value of all locomotives and rolling-stock passing in and out of this State on railroads crossing the lines thereof, to be ascertained by the proportion which the number of miles run within this State by such locomotives and other rolling-stock may bear to the whole number of miles run by such locomotives and other rolling-stock over the road belonging to such company, or any connecting line; the proportional value of all such locomotives and other rolling-stock, so ascertained, to be assessed as the property of the company owning and using the same, whether it be run upon its own or any other railroad within this State. The proportional value of all locomotives and other rolling-stock, and the value of all other personal and movable property, money, credits, and investments, shall be added to stationary and fixed property and real estate, and shall be apportioned by such officer to each county through which the road passes, in proportion to the fixed property and real estate belonging to the company in such county; and all the property so listed, shall be subjected to and pay the same taxes as other property listed in such county: *Provided*, That the roadbed, bridges, tunnels, depots, stations, machine-shops, machinery, freight-houses, stock-yards, rolling-stock, and all other necessary appendages and structures connected and used therewith, together with all the real estate which the

company is allowed by law to hold, shall be listed as aforesaid, or assessed by the Board of Commissioners, as hereafter provided, at their actual value in money, without reference to the amount expended in the construction or purchase thereof. * * * The auditor shall, on or before the 10th day of December in each year, or as soon thereafter as practicable, make out and transmit, by mail or otherwise, a statement of all taxes and levies, so charged to the president, secretary, or principal accounting officer of such company. * * * And it shall be the duty of such company so assessed and charged to pay the whole amount of such taxes and levies upon its property into the treasury of the State by the 20th day of January next after the assessment thereof, subject to a deduction of two and a half *per centum* upon the whole sum, if the same be paid on or before that day. If any such company fail to pay such taxes and levies by the said 20th day of January, the auditor shall add ten per centum to the amount thereof to pay the expenses of collecting the same, and shall certify to the sheriff of each county the amount of such taxes and levies assessed within this county; and it shall be the duty of every such sheriff to collect and account for such taxes and levies in the same manner as other taxes are collected and accounted for by him."

The foregoing is the last law on the subject of taxation passed by the Legislature of West Virginia during the year 1879, and is, so far as the same is material, a literal copy of the act passed February 4th, 1879, the other act referred to above. The last section of the act of March 7th, 1879, is as follows:

"SEC. 103. Chapter twenty-nine of the Code, chapter fifty-four of the acts of one thousand eight hundred and seventy-five, and all acts and parts of acts inconsistent with this act, are hereby repealed."

By this act, as also the act of February 4th, 1879, it was provided that the property of all railroad companies in the State should be taxed as other property of the people of the State.

There never was a contract made or entered into by and between the States of West Virginia and Virginia and the Chesapeake and Ohio Railway Company. Whatever of contract that was made was long before the Chesapeake and Ohio Railway Company had any corporate or legal existence; if there was such a contract as that referred to, it may have been with the Chesapeake and Ohio Rail*road* Company, but certainly not with the Chesapeake and Ohio Rail*way* Company.

The exemption from taxation claimed by the plaintiff in error is predicated upon an act of the Legislature of West Virginia passed March 1st, 1866, entitled "An act to incorporate the Covington and Ohio Railroad Company," the seventh section of which act is as follows:

"7. The rate of charge by said company for passengers and freight transported on the main line and branches of said railroad shall never exceed the highest allowed by law to other railroads in the State, and no discrimination shall be made in such charges against any connecting railroad or canal company chartered by the State, and no taxation upon the property of the said company shall be imposed by the State until the profits of said company shall amount to ten per cent. on the capital of the company."

The Legislature of West Virginia, in 1879, at the same session it passed the above-quoted act of March 7th, 1879, passed a statute amendatory of the last-quoted section. This amendatory act was passed January 31st, 1879, and is as follows:

"AN ACT to amend and re-enact section seven of chapter one hundred and thirty-one of the acts of one thousand eight hundred and sixty-six, entitled, 'An act to incorporate the Covington and Ohio Railroad Company, passed March first, one thousand eight hundred and sixty-six.'

"*Be it enacted by the Legislature of West Virginia:*

"1. That section seven of chapter one hundred and thirty-one of the acts of one thousand eight hundred and

sixty-six, entitled, 'An act to incorporate the Covington and Ohio Railroad Company,' be and the same is hereby, amended and re-enacted so as to read as follows:

"7. The rate of charges by said company for passengers and freight transported on the main line and branches of said railroad shall never exceed the highest allowed by law to other railroads in the State, and no discrimination shall be made in such charges against any connecting railroad or canal company chartered by the State."

The exemption clause contained in the seventh section of the act of 1866, it will be seen, is omitted in this act last quoted.

At the time of the passage of the act of 1866, by the Legislature of West Virginia the Constitution of that State adopted in 1863 was still in force.

Article 8, section 1, of said Constitution of 1863, is as follows:

"Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious, or charitable purposes, and public property, may, by law, be exempted from taxation."

It does not appear that the Covington and Ohio Railroad Company—the company to whose property exemption from taxation was sought to be given by the seventh section of the act of 1866, hereinbefore set out—was ever organized. The road was constructed and put in operation by the Chesapeake and Ohio Railroad Company, pursuant to authority given under and by a statute of the West Virginia Legislature passed on the 26th day of February, 1867; an amendatory act of 1868, and under a contract entered into by the States of West Virginia and Virginia, and the

Virginia Central Railroad Company, dated August 31st, 1868, confirmed and ratified by act of the Legislature of West Virginia passed January 26th, 1870. By virtue of the said contract and the act of 1870, the Chesapeake and Ohio Railroad Company was formed and was organized thereunder; the "benefits of the charter of the Covington and Ohio Railroad Company" were by said contract and statute conferred upon the Chesapeake and Ohio Railroad Company.

While I do not admit that the use of the word "*benefits*," as there used, for the construction and completion of the road, by its fair interpretation, transferred to that company any other benefits than those essential to the construction, equipment, and operation of said road, it is a fact that the Chesapeake and Ohio Railroad Company, organized under the laws of 1868 of West Virginia, and perhaps Virginia, did construct soon after that time, and in a few years thereafter complete, that portion of said road located within West Virginia between Covington and the Ohio river, and operated the same until the 1st day of July, 1878, when its works and property were conveyed to a committee of purchase, hereafter referred to. It is also a fact that the Chesapeake and Ohio Railroad Company never paid any taxes to the State of West Virginia during all that time.

On the 2d day of April, 1878, "the property and premises, rights, privileges, and franchises belonging to the Chesapeake and Ohio Railroad Company" were sold by William C. Wickham, special commissioner, under and by virtue of a decree rendered in said cause by the Circuit Court of Kanawha county, West Virginia, on the 18th December, 1877. This decree (see Record, page 88, paragraph XIII) contained the following provision:

"That there are certain unsettled and unadjusted claims for taxes made by the State of West Virginia against the defendant, The Chesapeake and Ohio Railroad Company, all of which claims are in dispute, and some of which are the

subject of pending litigation, as more fully set forth in the said commissioner's report. If it shall hereafter be found that the defendant company is liable for the taxes so claimed, or any part thereof, such taxes will constitute a lien upon the property of the said company embraced in the trust deeds hereinbefore mentioned; but the amount and nature of such lien, if any, cannot at present be ascertained or defined; and to the extent, if any, that this lien may hereafter be found to exist, it will rank in priority before any of the liens upon the same premises hereinbefore specified."

And on page 90 of the Record, under paragraph XVII, where provision and direction are made for the sale of the property and premises of the company, this language is contained in said decree:

"And whereas, the premises considered, it appears to and is found by this court that the premises cannot be otherwise sold to advantage, * * * it is further ordered, adjuged and decreed that * * * all and singular the premises, rights, privileges and franchises included and conveyed in and by the said deed of trust to the said Philo C. Calhoun and Wm. K. Kitchen, trustees, in the tenth paragraph of this decree mentioned, be sold as an entirety free and discharged of and from the liens and incumbrances of the said several mortgages and deeds of trust, and of and from each and every one of the said deeds of trust or mortgages in this paragraph mentioned, and free and discharged of and from all and singular the liens of every kind and description hereinbefore found and recited, *except the liens for taxes* hereinbefore referred to, if any such liens shall be hereafter established."

On the 1st day of July, 1878, the said special commissioner, under and by virtue of the authority vested in him therein referred to, conveyed the said property, franchise, privileges, &c., to the purchasers, as directed by decree of that date, with this proviso or reservation: "Subject, however, *to all taxes* of every kind and description that may have been or may hereafter be established as liens existing

upon the premises hereby conveyed, at or prior to the date of these presents." (See Record, p. 108.) In said deed it was provided that the name by which, by virtue of such conveyance, and the statutes in such cases made and provided, they (the purchasers) should and would become a corporation, is and shall be "The Chesapeake and Ohio Rail*way* Company."

This new company, styling itself "The Chesapeake and Ohio Rail*way* Company," forthwith became a corporation on the said 1st day of July, 1878, as it claims, by virtue of said conveyance and two certain acts of the Legislature of West Virginia, passed, respectively, February 4th, 1871, and February 20th, 1877. (See Acts of West Virginia Legislature, 1871, chapter 70, pages 90 and 91, and Acts 1877, chapter 12, pages 14 and 15.)

The act of 1871, entitled "An act relating to sales made under deeds of trust, or mortgages by railroads, or other internal improvement companies in this State," passed February 18th, 1871, is here set out at length:

"*Be it enacted by the Legislature of West Virginia:*

"1. If a sale be made under a deed of trust or mortgage, executed by a railroad or other internal improvement company in this State, on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them, and recorded in the recorder's office of any county wherein the property so sold, or any part thereof, is situated, or where said conveyance is recorded.

"2. The corporation created by or in consequence of such sale and conveyance, shall succeed to all such franchises, rights, and privileges and perform all such duties as would have been had, or should have been performed, by the first company but for such sale and conveyance; save only that the corporation so created shall not be entitled to debts due to the first company, and shall not be liable for any debts of, or claims against, the said first company, which may not be expressly assumed in the contract of purchase; and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he, or his assigns, may create so many shares of stock therein as he or they may think proper, not exceeding, together, the amount of stock in the first company at the time of the sale, and assign the same in a book kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for four successive weeks in a newspaper printed in each county in the State wherein said corporation may do business.

"3. The debts due to and by, and claims against, the said first company mentioned in the preceding section shall be subject to the provisions contained in the seventh section of chapter fifty-two, of the Code.

"4. This act shall not apply to any sales heretofore made, or any suits now pending in regard to such sales."

The act of 1877 above referred to, entitled "An act relating to sales of the works and property of railroad and other internal improvement companies under decrees of a court," passed February 20th, 1877, is as follows:

"*Be it enacted by the Legislature of West Virginia*, That in all cases where a mortgage or deed of trust has been executed upon the works and property of a railroad company or other internal improvement company the provisions of chapter seventy of the acts of one thousand eight hundred and seventy-one shall be applicable to a sale of said prop-

erty made under a decree of a court having jurisdiction in the case, and the purchaser at such sale shall have all the rights and privileges and be subject to all the responsibilities provided for in said chapter."

Chapter seventy, referred to in the last-named act, relates to the act of 1871, above set out in full. The only purpose of the act of 1877 was clearly to make the provisions of the act of 1871 applicable to a sale of the kind of property therein mentioned, made under decrees of court as well as those made under deeds of trust or mortgages, as provided for in the act of 1871. With that object considered as having been accomplished, and the act of 1871 thus enlarged, future reference to the provisions of these acts may be restricted to the act of 1871 alone.

It is by virtue of this act of 1871 that the plaintiff in error is entitled, if entitled at all, to the exemption from taxation enjoyed by the old company—The Chesapeake and Ohio Railroad Company.

Article 11, section 5, of the West Virginia Constitution of 1863, made provision for the passage of laws for the creation of the different kinds of corporations, and was in force at the time of the adoption of the West Virginia Code of 1869 and the passage of the act of the Legislature of West Virginia passed February 18th, 1871, under which act the plaintiff in error claims exemption from taxation. This section of the said Constitution is as follows:

"5. The Legislature shall pass general laws whereby any number of persons associated for mining, manufacturing, insuring, or other purpose useful to the public, excepting banks of circulation and the construction of works of internal improvement, may become a corporation, on complying with the terms and conditions thereby prescribed; and no special act incorporating or granting peculiar privileges to any joint stock company or association, not having in view the issuing of bills to circulate as money or the construction of some work of internal improvement, shall be passed. No company or association, authorized by this section,

shall issue bills to circulate as money. No charter of incorporation shall be granted under such general laws, unless the right be reserved to alter or amend such charter at the pleasure of the Legislature, to be declared by general laws. No act to incorporate any bank of circulation or internal improvement company, or to confer additional privileges on the same, shall be passed, unless public notice of the intended application for such act be given under such regulations as shall be prescribed by law."

In the Constitution of 1863 it is provided by article 4, section 1, that "the legislative power shall be vested in a Senate and House of Delegates. The style of their acts shall be, 'Be it enacted by the Legislature of West Virginia.'"

Prior to the first day of July, 1878—the time of purchase of the property of the Chesapeake and Ohio Railroad Company by the committee of purchase and the creation of the new corporation—The Chesapeake and Ohio Railway Company, as claimed by it, (see Record, p. 4,) and prior to the passage of the act passed February 18th, 1871, the West Virginia code of 1868 was, on the 1st day of April, 1869, adopted. On page 395 of said Code of West Virginia, 1868, chapter 53 and section 8 thereof, the following provision is contained:

"8. Where the Legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, alter or repeal any law relating to such company, nothing contained in this act shall be construed to surrender or impair such right. And the right is hereby reserved to the Legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company."

or to

This provision has never been repealed, but is the law of West Virginia to-day.

The Supreme Court of Appeals of West Virginia in deciding this case (see Record, p. 149) said:

"We therefore do pronounce the last clause of section 7 of the act of the Legislature passed March 1st, 1866, which declares that 'no taxation upon the property of the said company shall be imposed by the State until the profits of said company shall amount to ten per cent. on the capital of the company,' clearly prohibited by section 1 of article 8 of the Constitution of 1863, and therefore unconstitutional and void. * * * there was no contract made with any person or corporation by said last clause of section 7 of the act of March 1st, 1866, and of course no benefits under that clause of the section could pass to any one."

If that court was right in its views thus expressed, and that portion of the act of 1866 purporting to exempt from taxation the property of the Covington and Ohio Railroad Company was therefore unconstitutional and void, it follows that no valid contract could be made under it with either that company, the Chesapeake and Ohio Railroad Company, or the Chesapeake and Ohio Railway Company, since no person, company or corporation would be allowed to shelter itself behind a contract founded on a void law. In support of that court's decision I respectfully submit—

I.

That the act of the Legislature of West Virginia, passed March 1st, 1866, entitled, "An act to incorporate the Covington and Ohio Railroad Company," in so far as it purports to exempt the property of the Covington and Ohio Railroad Company from taxation, is in violation of article 8, section 1, of the West Virginia Constitution of 1863, and therefore void.

That section of the Constitution is as follows:

"Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of prop-

erty of equal value; but property used for educational, literary, scientific, religious or charitable purposes, and public property may by law be exempted from taxation."

To a proper consideration and construction of this section, it may be proper to look to article 4, sections 22, 23, of the Virginia Constitution of 1851, from which constitution the West Virginia Constitution of 1863 was taken; also to the journals of each of the conventions which adopted the two constitutions aforesaid, and to the journal of the convention of 1872 which framed the present Constitution of West Virginia, and the construction given by the said last convention to section 1, article 8, of the West Virginia Constitution of 1863, which section was adopted in almost the exact language used in the Constitution of 1863; also to the judicial construction given to similar provisions contained in the constitutions of some of our sister States,—in doing which I shall notice and examine such of the authorities relied on by complainant's counsel in the State Court, as I think bear upon the case, after which I shall cite and rely on several authorities from States whose courts have a standing for respectability not inferior to any State courts in this country.

First in order, then, come the said sections of the Virginia Constitution of 1851. They are as follows:

"SECTION 22. Taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value, which shall be prescribed by law.

"SECTION 23. Every slave who has attained the age of twelve years shall be assessed with a tax equal to and not exceeding that assessed on land of the value of three hundred dollars. Slaves under that age shall not be subject to taxation; and other taxable property may be exempted from taxation by the vote of a majority of the whole number of members elected to each House of the General Assembly."

By section 22, just quoted, it appears that taxation shall be equal and uniform; and in the same section a discrimination is made in favor of slaves. By section 23, in addition to a further discrimination in favor of slaves, it is expressly provided that "other taxable property may be exempted from taxation by a majority vote of the whole number of members elected to each House of the General Assembly." I have not been able to procure a copy of the "Debates" of the Virginia Convention of 1851.

The West Virginia Convention of 1862, in adopting our Constitution of 1863, although using the Virginia Constitution (1851) as its chart, deemed it proper, among other things, to omit that part of the section in the Virginia Constitution which provided that "other taxable property might be exempted," or that negroes might be exempted from taxation; and, in lieu thereof, after the words in the Virginia Constitution that "taxation shall be equal and uniform throughout the commonwealth, and all property," used the words, "both real and personal, shall be taxed in proportion to its value"—thus laying stress on the word "all"—all property of whatever kind, "both real and personal," thereby including all and every description of property, with the same clearness and force characteristic of Sir William Blackstone in his classification of property into "Things Personal" and "Things Real," while the Virginia Constitution simply used the words "all property"—an expression which, while certain, may at the same time be regarded so general as not to exclude all other constructions. The West Virginia Constitution also, in lieu of the provision allowing other taxable property to be exempted at the discretion of the Legislature, provided specifically and by name what property might by law be exempted from taxation, thus leaving the Legislature no discretion in the matter whatever, but rendering it imperative that the Legislature should provide by equal and uniform taxation, and in proportion to its value, a revenue to be col-

lected upon all the property, both real and personal, throughout the State.

That this is the true and only correct construction of section 1, article 8, of the Constitution of 1863, I think well settled, so far as the courts are concerned. But we are not left to judicial construction alone. We have the construction of the constitutional convention of 1872 upon the provision referred to in the Constitution of 1863. Section 1, article 8, of the Constitution of 1863 was adopted almost *verbatim* by the convention of 1872. This last convention not only provided specifically and by name for the exemption from taxation of identically the same kind and classes of property exempted in the Constitution of 1863, but they added to the list of property which may be exempted from taxation one, and but one, other class of property, viz., "cemeteries;" while an effort, as is disclosed by the journal of that body, was made, without success, however, to include in that list other classes of property, such as libraries, belonging to professional men.

On page 202 of the journal of the convention it appears that an amendment was offered to the report of the committee of the whole, by adding at the end of the first section of article 10, (article 8, section 1, in Constitution of 1863,) the following: "*Provided*, That the Legislature shall have the power to exempt from taxation all agricultural implements used in farming," &c. This amendment, with certain amendments thereto, was adopted, thus showing that that convention considered the Legislature, by the language contained in the said first section, prohibited from exempting property not enumerated therein from taxation. See also page 204 of same journal, where, upon motion of Mr. Johnson, of Wood, the vote by which said amendment had been adopted was reconsidered, and the amendment rejected, thus showing that the convention refused to give to the Legislature the power to make such exemption. From this action of the convention of 1872

it is plain that that body considered that the language contained in section 1, article 8, Constitution of 1863, and adopted as a part of the Constitution of 1872, prohibited the Legislature from exercising its inherent power in exempting from taxation any property, either real or personal, not specially enumerated in said section as the subject of such exemption. It would hardly be contended, I imagine, that the Legislature could now exempt from taxation "agricultural implements used in farming." And if not in that case, then the act exempting the Covington and Ohio Railroad Company from taxation was illegal, unconstitutional, and void.

The courts, however, have given judicial construction to the very language used in the Constitution of 1863. Let us examine some of their decisions; before doing which, however, it will be well perhaps to notice an authority cited and relied on by counsel for complainant in the State court. It is the case of Williamson *v.* Massie, Auditor of Virginia, reported in 33 Grattan. Counsel for complainant there attached a great deal of importance to that case. Let us look briefly, and see how far it sustains them, whether applicable to this case, and whether this court can regard it as even persuasive authority. It is a decision made upon a case arising upon a statute passed under sections 1 and 3, article 10, of Constitution of 1870 of Virginia.

In delivering his opinion in that case, Judge Anderson gave his interpretation to those sections of the Virginia Constitution, which sections are as follows:

"SECTION 1. Taxation, except as hereinafter provided, whether imposed by the State, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

"SECTION 3. The Legislature may exempt all property

used exclusively for State, county, municipal, benevolent, charitable, educational, and religious purposes."

It will be observed that section 1 above quoted differs very materially from section 1, article 8, of our Constitution in this: that *it* says "taxation, except as hereinafter provided," &c., shall be equal and uniform, while our Constitution says "taxation shall be equal and uniform throughout the State." Further, section 1 in the Virginia Constitution contains no exemption clause qualifying or explaining the rest of the section, an independent section, viz., section 3, being used to express and set out the kinds of property which might by law be exempted; and while it is true that the third section is in the same chapter with the first section, and to that extent is connected therewith, it is used separately, and not in a qualifying sense, nor in the same connection with the language contained in the first section. It is not made dependent upon, nor does it in terms refer to or qualify, the said first section. While the section referred to in the Constitution of 1863, after providing that "taxation shall be equal and uniform," and what property may be taxed, viz., "and all property, both real and personal, shall be taxed," and the manner of its taxation, viz., "in proportion to its value," explains and qualifies the foregoing by inserting the following language, commencing with the disjunctive conjunction "but," in the sense of however, notwithstanding, nevertheless, "but property used for educational, literary, scientific, religious, or charitable purposes, and public property, may by law be exempted from taxation. The language of the Virginia Constitution, then, is not "practically identical" with the Constitution of 1863, nor is the connection the same. On the contrary, it is to be observed that there is a very marked distinction both in the language and the connection in which the same is used in the two constitutions. In the Williamson *v.* Massie Case, 33 Grattan, above re-

ferred to, Judge Anderson, on page 241, in order to reach the conclusion arrived at by him, after speaking about the power of the Legislature to exempt property from taxation, unless forbidden by the Constitution, uses the following language:

"Is it forbidden by the above clause in the Virginia Constitution? In State *v.* North, 27 Mo. R., 464, it was held 'that the provision in the Constitution of that State which declares that all property subject to taxation shall be taxed in proportion to its value, (substantially the same that is contained in the clause of the Virginia Constitution above cited,) does not require that all property in the State shall be taxed, but that when any species of property is selected for taxation it shall be taxed in proportion to its value.' And such, we think, is the meaning of the clause of the Virginia Constitution above cited."

It is a little singular, to say the least, that Judge Anderson should have failed to see that the word "subject" occupied a prominent place in the Missouri Constitution, coming in the connection, too, that it does. The Missouri Constitution, it will be observed, does not say that all property shall be taxed in proportion to its value, but that all property "subject to taxation" shall be taxed in proportion to its value. How the one expression can be looked upon as "substantially the same" as the other I fail to comprehend, especially when words used in the organic law are supposed to mean something—to have given to them at least their ordinary signification. But that is not all; the Missouri decision as quoted shows that taxation is to be enforced upon any species of property "selected" for taxation; and it follows that only such can be selected which is by law (the power being inherent in the Legislature) made the "subject" of taxation.

To further sustain himself in the position assumed, Judge Anderson, on page 243, after referring to the Virginia Constitution of 1850 and 1851, says:

"Under that constitution exemptions were frequently made, and I am not aware that the constitutionality of those exemptions has ever been even questioned."

The trouble about the judge's application there is, however, that he loses sight, in quoting from section 22 of article 4 of the Constitution of 1851, of the very important fact that the very next section—section 23—says in terms that "other taxable property may be exempted from taxation by the vote of a majority of the whole number of members elected to each House of the General Assembly." The case of Orange and Alexandria Railroad Company *v.* City of Alexandria simply decides that the exemption by the act of the General Assembly was limited to State taxation, (with whom the contract was,) and hence did not extend to exemption from taxation by the city corporation. In this last case the question of the constitutionalty of the act did not arise, for the very manifest reason that under the Constitution of 1851 the Legislature had express authority—given it in terms by that instrument—to make upon a certain vote exemptions of any taxable property, which is not the case in the Constitution of 1870, the Constitution in force in Virginia when Judge Anderson delivered his opinion above referred to. Nor is it the case in either the Constitution of 1863 or that of 1872 of this State. On page 244 the same judge says:

"It was contended by the plaintiff that the exemption of the State bonds in this case from taxation, as those bonds were issued by the State, the principal payable in forty years, bearing interest for ten years at the rate of three per cent., for twenty years at the rate of four per cent. interest, and the remaining ten years at five per cent. interest, in exchange for six per cent. bonds of the State then outstanding, which would be a saving of millions of dollars to the State, was exclusively for the benefit of the State, and is therefore within the express authority given by this third section to exempt."

The two reasons given by Judge Anderson, and from which he evidently formed his opinion, are not, it is submitted, of sufficient force to entitle the opinion to very much deference at the hands of this court. It will be observed that Judge Christian was the only judge who concurred in the opinion of Judge Anderson. Judge Montcure did not sit in the case; Judge Staples dissented; and while Judge Burks concurred that the coupons were receivable for taxes, on account of which they were tendered in payment by the relator, regarding that question, as he said, settled by the previous decisions of that court, and, doubtless, for the further reason that the coupons were exclusively for the use and benefit of the State, and therefore exempt under the third section above quoted, it is to be observed that he used the following very significant language, which, while delicate and courteous to his brother delivering the opinion in the case, is unmistakable in meaning:

"The power to exempt the obligations of the State from taxation is incidental to the power to contract, adjust, and provide for the payment of such obligations. I am not prepared, however, to say whether or not the power of exemption under the Constitution is without limitation, and extends to property generally within the uncontrolled discretion of the legislature. The question is a very grave one, and, in the view I take, need not be decided in the present case. I wish, therefore, to be understood as not expressing any opinion upon it."

In view of the fact that the opinion of Judge Anderson delivered in the case was concurred in by only one other judge of the court, it is submitted that the case of Williamson *v.* Massie, so confidently relied on by counsel for complainant, cannot have the weight of authority given to it; and further, that even if it could be considered as authority, it has no application to this case for the reasons already

given. In fact, it should be regarded as a mere *obiter dictum*.

Without commenting at length on the case of Commonwealth *v.* Chesapeake and Ohio Railroad Company, 27 Gratt., 352, relied on by complainant, it is sufficient to say here that no question as to the constitutionality of any law was raised in that case on either side.

The language upon the subject of taxation, referred to by counsel for complainant, in the Constitutions of Virginia and Missouri being so unlike that of our Constitution, let us look to the judicial construction given to provisions similar to our own by the courts of other States. Article 12, section 2, of the Ohio Constitution says:

"Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money; but burying grounds, * * * may, by general laws, be exempted from taxation."

"This provision," says Cooley, "renders it imperative that all the property of which exemption is not permitted by it shall be taxed, and precludes any other exemptions than those indicated, as well when the tax is for a municipal purpose as when it is levied for a State purpose."

Cooley on Taxation, p. 143.

This was the construction given to the provision above quoted in Zanesville *v.* Richards, 5 Ohio N. S., 589; see also Baker *v.* Cincinnati, 11 Ohio N. S, 541, where Gholson, judge, in delivering the unanimous opinion of the court, says, in speaking of the above-quoted constitutional provision:

"The anxiety was that no property should escape its proper and equal burthen. It is well known that with difficulty any exemption, even of things regarded most sacred, was secured. Section 2 of article 12, and other

sections of the same article, clearly show this anxiety. The things in contemplation were property of every possible description, and an equal and uniform tax upon that property according to its true value in money. The exemptions to be allowed from that tax are specially enumerated."

The provision in the Ohio Constitution cannot be considered clearer or more certain in meaning than ours is. In fact, the two provisions are so nearly alike, that if one is uncertain the other is necessarily obscure. The provision referred to in the Ohio Constitution, after saying that laws should be passed "taxing, by uniform rule, all moneys," (and sundry personal securities,) continuing, says, "and also all real and personal property according to its true value in money." Our Constitution says: "All property, both real and personal, shall be taxed in proportion to its value." If special force is to be given to the word "all" in Ohio, then the same force should extend to the word "all" here. One Constitution, in speaking of value, says, "according to its true value in money;" the other says, "in proportion to its value," the exempting clause in both, while specifying different items, in form is the same, commencing with the adversitive conjunction "but." The Constitution of California on this subject is as follows (article 11, section 13):

"Taxation shall be equal and uniform throughout this State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law."

This provision is certainly no more positive or explicit than ours.

It says that "taxation shall be equal and uniform throughout the State." Our section says the same. It says "all property in this State." Ours says "and all property, both real and personal;" while both say "shall be taxed in proportion to its value."

It has no clause purporting to enumerate the different classes of property for exemption from taxation, while ours has, and is explicit, and by its enumeration thereof excludes without modification the idea that the Legislature shall still have power to exempt from taxation any other class of property.

If such is not the true construction of the constitutional provision, and if such was not the intention of the framers of that provision, why give the Legislature the power to exempt the property enumerated, when such power already existed in the Legislature as an inherent power, and when by section 1, article 4, that body was vested with the whole legislative power of the State. It will be observed that the clause referred to is not a compulsory but a mere permissive power, and therefore excludes the idea of a further permission or power in that direction. "*Expressio unius est exclusio alterius.*"

The provision in the California Constitution above referred to has received judicial construction time and again, directly and incidentally, by the courts of that State. (See Cooley on Taxation, pages 132, 133, and authorities there cited.)

In the case of People *v.* Eddy, 43 Cal., 332, it was held that "it was not intended by the framers of the Constitution that the Legislature should have the power to exempt any kind of property from taxation."

After considering an act of the Legislature of that State passed for the purpose of preventing the collection of taxes on debts secured by mortgages, Judge Rhodes, on page 339, says:

"If legislation of this character can be sustained, why may not the exemption proceed until the whole burden of taxation is cast on one species of property? Debts secured by mortgages have now the benefit of the exemption; but by a change in the tone and temper of the Legislature they might be made to bear the whole burden of

the taxes. It was not intended by the framers of the Constitution that the Legislature, whether actuated by honest or corrupt motives, should have the power to exempt any kind of property from taxation. The exercise of the power would be dangerous."

Again:

"That the burden of taxation should rest equally upon all property within the State ought to be axiomatic, not only in theory but in practice. To enforce this rule, the Constitution has provided that 'taxation shall be equal and uniform throughout the State.'"

See also page 336, where the same judge says that "the doctrine that all property in the State is subject to taxation, and cannot be exempted by the Legislature, has been repeatedly affirmed in this court." And in support of the assertion cites People *v.* Gerke, 35 Cal., 677; People *v.* Black Diamond C. M. Co., 37 Cal., 54; People *v.* Whartenby, 38 Cal., 461; see also Wilson *v.* Supervisors of Sutter County, 47 Cal., 91. It will be observed that the two opinions above quoted from, the one rendered by Judge Gholson and the other by Judge Rhodes, were both unanimous opinions of the courts in which they were respectively delivered, while Judge Anderson's opinion in the case of Williamson *v.* Massie, 33 Gratton, relied on so confidently by counsel for plaintiff in error, has not the concurrence of a majority of the court, nor is it based upon a constitution similar to ours. The Constitutions of Virginia and Missouri are both very unlike ours on the subject of taxation, while those of Ohio and California use substantially the same language and mean precisely the same thing, and are therefore directly applicable to ours.

The idea advanced by the complainant's counsel in the State court, that the language contained in our Constitution is "either mere surplusage or it is a grant of power," is, I think, clearly untenable. It is rather a strange and

new rule of interpretation to attribute to language used in a constitution the meaning of surplusage, especially when a constitution is a mere chart, containing as few words as are absolutely necessary to embody the fundamental principles of government, the corner-stone upon which the legal edifice is erected. "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart, upon which every man learned and unlearned may be able to trace the leading principles of government." (Cooley Const. Lim., 58.)

"Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the Government must at all times shape their conduct. * * * We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance and worthy to be embraced in an instrument which for a time, at least, is to control alike the Government and the governed."

Further, it is a well-settled rule in the construction of constitutions and statutes that words shall be taken in the ordinary and popular sense in which they are used, unless the context shows that the words are used in a technical or some arbitrary sense. (People *v.* Eddie, 43 Cal., 332.)

It can scarcely be regarded a grant of power, since by article 4, section 1, of the same constitution, the legislative power of the State is expressly vested in the legislature, leaving no further grants to be made. (Baker *v.* Cincinnati, 11 Ohio N. S., 540, 541.)

The Arkansas Constitution, on the subject of taxation, is

similar to the Ohio Constitution, and has received the same construction. It provides:

"ARTICLE 10, SECTION 2.—Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money; but burying-grounds, public school-houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, shall never be taxed; * * * but the General Assembly may exempt from taxation personal property to the value of five hundred dollars to each tax-payer."

The same construction given to the Ohio Constitution was extended to the above-quoted Arkansas constitutional provision in the case of Fletcher *v.* Oliver, Sheriff, &c., 25 Ark., 289. Judge McClure, on page 295, in delivering the opinion of the court, used the following unmistakable language:

"The imperative command of the Constitution is, that the Legislature shall tax, by uniform rule, all property except that specifically enumerated as being exempt from tax by the express terms of the Constitution."

By article 8, section 2, of the Iowa Constitution it is provided that "the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." Under this provision, it was held in the case of the Iowa Homestead Company *v.* Webster County, 21 Iowa, 227, that a law to exempt from taxation the property of a railroad company would be obnoxious to and in conflict with the provision of the Iowa Constitution just quoted, and therefore void. It will be observed that the Iowa Constitution does not provide how individuals shall be taxed, and is not as clear and explicit as our Constitution in the prohibition of the Legislature from exemptions of property from taxation.

The case of Hunsaker *v.* Wright, 30 Illinois, 146,

does not sustain the complainant, as contended by counsel in the State court, that "while the court held that exemptions generally were prohibited, this prohibition did not prevent exemptions as a matter of contract and for a consideration." On the contrary, the case shows (page 148) that the court held, and that without any qualification whatever, in speaking of the constitutional provisions relative to taxation, that "under these provisions the Legislature has no power to exempt or release a person or community of persons from their proportionate share of these burthens." This was in 1863, and under a Constitution no more explicit—if in fact it was as much so—than our own. The court simply held in that case that the Constitutional provision did not prevent the Legislature from commuting such a tax for an equivalent burthen.

In the case of O'Kane *v.* Treat *et al.*, 25 Illinois, 557, a provision of the charter of the city of La Salle, which exempted its citizens from paying taxes towards the construction of or from laboring upon roads outside of that city, was held to be unconstitutional, as being in conflict with those provisions of the Constitution which provide for an equality of taxation based upon valuation.

Similar ruling was had in Fletcher *v.* Oliver, 25 Ark., 289, the exemptions being treated as a privilege, though in the nature of a contract, the community at large and outside the cities of Little Rock and La Salle being greatly benefited by the increase of commerce and trade brought about by the building up of those places, similar to the benefits derived to the people along the line of the Chesapeake and Ohio Railway.

In the case of Hunsaker *v.* Wright, however, it was not a mere privilege, but a commutation or settlement of the taxes in assuming another burthen, and upon the condition of its discharging that burthen, viz., "provided the city (Cairo) should support the resident paupers thereof, and pay the expenses of the Circuit Court in all criminal cases

for offenses committed by citizens, and all jail fees accruing therefrom, "in which case the property within the city should be exempt from taxes levied for county purposes, as also from working the roads outside the city. It is submitted therefore that there is no similarity between the last-named case and this one. That the provision in article 8, section 1, Constitution of 1863, which provides that certain enumerated classes of property may be exempted by law, is directory and not mandatory, see Cooley's Constitutional Limitations, 79; Miller *v.* State, 3 Ohio N. S., 483; Pine *v.* Nicholson, 6 Ohio N. S., 179; Washington *v.* Murray, 4 Cal., 388; Hill *v.* Bayland, 40 Miss., 618; and McPherson *v.* Leonard, 29 Md., 377, where the provisions that the style of all laws shall be, "Be it enacted by the General Assembly of Maryland," was held directory.

A State is never presumed to have abandoned her right to tax.

"No limitations or restrictions upon the exercise of this essential attribute of Government can be raised by implication."

Cooley on Taxation; Lane County *v.* Oregon, 7 Wall., 71; State *v.* Parker, 32 N. J., 426; Eyre *v.* Jacob, 14 Gratt., 422. See also Cooley's Const. Lim., ch. 14, on "Power of Taxation," and the numerous authorities cited, including Tennessee, Michigan, and Wisconsin decisions upon the constitutionalty of exempting statutes.

In accordance with this position and the views here expressed, the Supreme Court of Appeals of West Virginia in this case declared a portion of the seventh section of the act of 1866 unconstitutional, and pronounced the same void.

While I do not contend that that decision in this case is binding upon this court, I may be pardoned for calling attention to the language used by Mr. Chief Justice Waite in Railroad Companies *v.* Gaines, 97 U. S., 709, where he says:

"The decision ought not to be overruled unless it is clearly wrong. The delicate power which we have, under the Constitution of the United States, over the judgments of the State courts, ought always to be used with the greatest caution. There should be no reversal of such judgments unless the error is manifest."

If this view be now adhered to, it is submitted that the decision of the State court in this case will surely be affirmed.

Conceding, for the sake of argument, that the West Virginia Constitution of 1863 does not limit and inhibit the Legislature in the exercise of its power to exempt from taxation property other than that enumerated in article VIII, section 1 thereof, and that the act of 1866 was therefore constitutional; and that it, together with the acts of 1869 and 1870, did extend to the Chesapeake and Ohio Rail*road* Company immunity from taxation; that such immunity was for a consideration, and as such created a contract between the State of West Virginia and the Chesapeake and Ohio Rail*road* Company,—it is submitted as my *second proposition*—

II.

That the said contract terminated on the 1st day of July, 1878, the date of the sale and conveyance of the works and property of the Chesapeake and Ohio Rail*road* Company, at which time the said *company*, by virtue of such sale and conveyance, was, by operation of the West Virginia statute of 1871, "*ipso facto dissolved*;" and that the *contract* having been thus extinguished, the exemption from taxation theretofore existing as a part thereof necessarily ended with it.

This position cannot be successfully controverted, unless it be shown that such exemption was in some manner known to the law, kept alive, and continued by the State

to the purchaser of the property of that company. It cannot be maintained that the sale and *conveyance* of the property carried with them the immunity or exemption from taxation enjoyed by the old company, since, as was said by Mr. Justice Field in Morgan *v.* Louisiana, 93 U. S., 223, "immunity from taxation is a *personal*, not a *positive*, privilege, and incapable of transfer without express statutory direction."

If, then, the IMMUNITIES enjoyed by the Chesapeake and Ohio Rail*road* Company were "incapable of transfer without express statutory direction," and if there never was any such express statutory direction, it follows that the moment the old company was dissolved the contract for exemption was terminated, and with it the exemption itself ended.

Trask *v.* McGuire, 18 Wall., 392.

But it is urged by counsel for plaintiff in error that by virtue of the acts of the Legislature of West Virginia passed, respectively, February 18th, 1871, and February 20th, 1877, (both of which acts are hereinbefore set out at large,) the property of the Chesapeake and Ohio Rail*way* Company is exempt from taxation.

Neither of these last-named acts having mentioned, by name, or in any other way referred to, "the Chesapeake and Ohio Rail*road* Company, or to "the Chesapeake and Ohio Rail*way* Company," they cannot, it is respectfully submitted, be considered as containing "a plain statutory direction" for the transfer of the *immunity* from taxation enjoyed by the Chesapeake and Ohio Railroad Company. The word *immunity* is not used in either of said acts; and that part of the act of 1871, section 1, which specifies what shall pass by the sale and conveyance of the works and property of the old company, does not even use the word *privileges*, but says, in plain language, "such sale and con-

veyance shall pass to the purchaser at the sale not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but *any works* which the company may, after that time and before the sale, have constructed, and *all other property* of which it may be possessed at the time of the sale, other than debts due to it.

Here the act of 1871, by plain statutory direction, expressly and in terms declares what shall be transferred under and by said sale and conveyance, and nothing, therefore, not included by the language there employed can be considered as a part of the grant or transfer therein directed. Certainly immunity from taxation which is a personal privilege, and which does not, therefore, attach to the works or property mentioned in said section, is not included, and was not intended to be transferred, by the Legislature in the use of any language contained in that section.

Can it then be inferred that the Legislature, by the use the words franchises, rights, and privileges, in that part of the second section of said act which says, "The corporation created by or in consequence of such sale and conveyance, shall succeed to all such *franchises*, rights, and privileges, and perform all such duties as would have been had or should have been performed by the first company but for such sale and conveyance," intended to *direct* or to authorize the transfer of the immunity from taxation, or other special privilege which might be enjoyed by any of the different railroad companies in that State, and whose works and property might be sold under the provisions of that act?

The act of 1871 is a general, not a special law. It is therefore applicable to all railroad companies in the State whose property may be brought to sale under its provisions.

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The act of 1871 is a general, not a special law. It is therefore applicable to all railroad companies in the State whose property may be brought to sale under its provisions.

Can it be supposed that the Legislature intended, by the use of the word "privileges," in the second section of the

act of 1871, that no matter what railroad property in the State might be sold and conveyed, the purchaser should, by the provisions of this act, and by the use of the word "privileges," as there used, be endowed with all the special privileges, personal as well as positive, which may have been granted to the old company while in its infancy, and before the completion and establishment of the road?

Is it not rather the reasonable as well as the proper construction that the Legislature, by the use of the word "privileges" in the second section, in connection with the word "franchises," and what the new company should succeed to, instead of in the first section, where the plain statutory direction is contained specifying what shall pass or be transferred, made use of it, in its positive and not in its personal sense, as synonymous with the word "franchise," and not in the sense of immunities, which are personal privileges? The difference in the use of the word privileges in the West Virginia statute of 1871 from that relied on in Humphrey *v.* Pegnes is apparent. In this case *franchises*, rights, and privileges are used, while in Humphrey *v.* Pegnes *powers*, rights, and privileges are the words employed.

In this last case it is evidently used in the sense of rights, privileges, and immunities, while in the case at bar it is limited to franchises, rights, and privileges.

That there is a difference in the meaning of the word "privileges," when used in these different connections, is clearly illustrated by Mr. Justice Field in Morgan *v.* Louisiana, 93 U. S., page 223, where the following language is used:

"Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.'

"It is often used as synonymous with rights, privileges, and immunities, though of a personal or temporary character; so that, if any one of these exists, it is loosely termed a "franchise," and is supposed to pass upon a transfer of

the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges, which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company. The latter is personal, and incapable of transfer without express statutory direction."

The language in this act of 1871 is too general for the construction to be placed on it that the Legislature clearly intended to transfer, or even thought of transferring the immunity from taxation of a railroad company whose name was not even mentioned in any portion of said act, especially when the exemption is not in terms mentioned. When the word immunities, its equivalent is not used, and when the word privileges is not employed in any other sense, so far as the context shows, than as a positive privilege, or positive right incident to a franchise, and in connection with which last word the same is used. It must be borne in mind that this is a general statute referring to, and governing the sales of, all railroad property, and the terms used are general, intended to apply to the usual and common rights and privileges, and not contemplating the transfer of an exceptional and special privilege. Such a construction as that claimed by the plaintiff in error would overthrow the heretofore-accepted doctrine of the law—that "no limitations or restrictions upon the exercise of this essential attribute of government can be raised by implication, but the intention to limit or abridge it must be expressed in clear and unambiguous language," or that

"the intention to exempt must in any case be expressed in clear and unambiguous terms; taxation is the rule; exemption is the exception." (Cooley on Taxation, 66; Id., 146.)

As said by Mr. Justice Field, in construing the Louisiana statute, in Morgan *v.* Louisiana, p. 222:

"The language of the statute requires no such construction, and intendments will not be indulged to enlarge the operation of a clause restraining the exercise of a sovereign attribute of a State."

In Central Railroad, &c., Company *against* Georgia, 92 U. S., 674, Mr. Justice Strong says:

"But it is a well-settled principle that a claim for exemption from taxation cannot be supported unless the statute alleged to confer it is so plain as to leave no room for controversy. No presumption can be made in support of the exemption; and if there be a reasonable doubt, it must be resolved in favor of the State." (See also Providence Bank *v.* Billings, 4 Peters, 561; Delaware Railroad Tax, 18 Wall., 206; Bailey *v.* McGuire, 22 Wall., 215.)

If then, as has been submitted, the immunity of the Chesapeake and Ohio Rail*road* Company was ended on the first day of July, 1878, the date of the dissolution of that Company, and if, as there can be no question, any other exemption than one based on contract *for consideration*, is merely voluntary, and as such repealable at the pleasure of the Legislature, it follows that, unless a new contract was entered into between the State of West Virginia on the one part and the Chesapeake and Ohio Rail*way* Company on the other part for the exemption of its property, based upon a new consideration, such property is not exempt from taxation beyond the power of the Legislature, since all voluntary exemptions are repealable. (Cooley on Taxation, 145.)

It cannot be claimed that any contract for exemption

was created by the West Virginia act of 1871. There is nothing in any of the provisions of said act which raises such an inference. Then, since no new contract was entered into between the State of West Virginia and the plaintiff in error by virtue of either of the said acts of 1871 or 1877, and since no new consideration existed, or was thereby raised for or received by the State, it follows—

III.

That any right of exemption from taxation acquired by plaintiff in error, if indeed the language of either of those acts would warrant such an inference, was acquired by virtue of the act of 1871, under its purchase and conveyance, and was therefore a mere voluntary exemption, and as such repealable.

The exemption here spoken of being a voluntary, and not a contract, exemption, and as such repealable, and the Legislature of West Virginia having by act of March 7th, 1879, passed a general law on the subject of taxation—manifestly intended as a revision of all laws on that subject—it operates to repeal the acts of 1871 and 1877 so far as they can be considered to have exempted from taxation the property of the plaintiff in error. (Columbian Manufacturing Company *v.* Vanderpool, 4th Cowen, 556; Fox, Administrator, *v.* Commonwealth, 16th Gratt.)

Especially is this true, as by section 103, the last section of the act of March 7th, 1879, it is expressly provided that "all acts and parts of acts inconsistent with this act are hereby repealed."

The case of Humphreys *v.* Pegnes, 16 Wall., 244, relied on by counsel for the company in the State court, is in no sense in conflict with my position, as stated in this and the next preceding proposition. In that case the statute *plainly directed* the transfer of the "immunity" or exemption from taxation enjoyed by the old company; it referred plainly

and *by name* to each and all of the different railroad companies concerned; the *consideration* still remained, the road having lain dormant for fourteen years, during all of which time "no sufficient *inducements* had been found to procure the building of the * * road," while in this case no road was mentioned by name or otherwise designated, none remained to be constructed, and no other consideration existed. In that case the consideration, without which no valid contract can be made or entered into, still existed. Soon after the passage of the act of 1863, in that case, the road which had lain dormant since 1849 was built and put in operation. On page 249 Mr. Justice Hunt, in delivering the opinion of the court, says:

> "These facts serve to show, first, that there was in this instance the consideration that at any time exists for the granting by the Legislature of such privilege to aid the acceptance of the same and the building of the road."

If, however, I am wrong in the position taken, that the "immunity" from taxation enjoyed by the Chesapeake and Ohio Rail*road* company did not pass, and was not granted or transferred by the West Virginia act of 1871, to the property of the Chesapeake and Ohio Rail*way* Company, then, although it be considered that such exemption, by virtue of that statute, was conferred upon the plaintiff in error, I respectfully submit, as conclusive against the right of the Chesapeake and Ohio Rail*way* Company, either to hold or enjoy such exemptions:

IV.

That the act of the Legislature of West Virginia passed March 7th, 1879, whereby it was enacted that the property of all railroad companies in the State should be taxed as other property of the people, was not prohibited by that provision of the Constitution which declares that no State shall pass a law impairing the obligation of contracts.

Assuming that the position taken in the preceding propositions is not tenable, and that other reasons must be found and furnished for the establishment of this proposition, I respectfully submit that if the Chesapeake and Ohio Rail*way* Company is a corporation entitled to rights, franchises, and privileges, it is so as the creature of the act of 1871, and as such acquired all its corporate powers by virtue of that act.

The bill alleges (see Record, page 8) that "by virtue of the matters aforesaid it, on the first day of July, 1878, became and was, and has since continued to be, and now is, a corporation by the name of The Chesapeake and Ohio Railway Company, entitled to all the works, property, estate, rights, franchises, and privileges theretofore owned, used, and enjoyed by the Chesapeake and Ohio Rail*road* Company, including therein the exemption from taxation on the property of the said company." The matters aforesaid above referred to, as appears on the same page of the Record, are the act of 1871, the act of 1877, and the deed of conveyance made by special commissioner Wickham. The only authority of any of these three sources which could, or purports to, confer corporate powers, franchises, and privileges, is that of the act of 1871. It is by this act, also, that provision is made for the creation of a new corporation out of the purchaser of the property of the old one, and for the dissolution of the old company upon the sale and conveyance of its property.

The corporate existence, then, of the Chesapeake and Ohio Railway Company, and such rights, franchises, and privileges as it possesses, being derived from the act of 1871, the same are "held solely by virtue of the grant that act made."

Railroad Co. *v.* Georgia, 98 U. S., 363.

It is a fact that by the terms of that act the Chesapeake and Ohio Rail*road* Company was, on the 1st day of July,

1878—the date of the sale and conveyance of its works and property—*ipso facto dissolved*. This being true, the charter of that company necessarily returned to the State, whence it had its origin, or, what amounts to the same thing, passed out of existence with the dissolution of that company.

Looking to the act of 1871, it will be seen that express provision is there made, whereby "the purchaser shall forthwith be a corporation, by any name which may be set forth in said conveyance."

The second section of this act endows the new corporation with corporate powers, franchises, rights, and priviliges; true, it does so by reference to the charter of the old company, instead of by special enumeration; but that matters not, since "the powers and privileges of a new corporation may as well be designated by reference to the charters of other companies as by special enumeration."

Railroad Co. *v.* Maine, 96 U. S., 510.

The Chesapeake and Ohio Railway Company, then, if a corporation, came into existence under a fresh *grant*—that contained in the act of 1871—"not only its being, but its powers, its franchises, and immunities, are grants of the Legislature which gave it its existence."

Railroad Co. *v.* Georgia, 98 U. S., 364.

The Chesapeake and Ohio Railway Company thus became a new corporation, as distinct from the old one as though it had been created before its existence.

Railroad Co. *v.* Maine, 96 U. S., 510.

Louisville and Nashville R. R. Co. *v.* Palmes, 109 U. S., 254.

Shields *v.* Ohio, 95 U. S., 319.

The old company having, on the 1st day of July, 1878, been, by the terms of the act of 1871, *ipso facto dissolved*, "its powers, its rights, its franchises, privileges, and im-

munities," in the language of Mr. Justice Strong in Railroad Co. *v.* Georgia, "ceased with it," and the Chesapeake and Ohio Railway Company has no existence, except by virtue of the grant of corporate powers and privileges made by the act of 1871.

It necessarily follows that this new corporation, so created, held the rights granted to it under and subject to the law as it was on the 1st day of July, 1878, the date of its corporate birth; and the West Virginia Code of 1868, which came into force on the 1st day of April, 1869, long before the charter to the Chesapeake and Ohio Railway Company was granted, and which was in force at the date of the creation of said company, contained the following provision:

"SECTION 8. * * * And the right is hereby reserved to the Legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company."

Consequently the charter of the Chesapeake and Ohio Rail*way* Company was held subject to a power in the Legislature to alter or repeal it, or any law applicable to such company, at the will of the Legislature—its creator. "This provision of the Code became, in substance, a part of the charter."

Railroad Co. *v.* Georgia, 98 U. S., 365.
Railroad Co. *v.* Maine, 96 U. S., 499.

Hence the exemption from taxation, if any such, indeed, were ever granted to the Chesapeake and Ohio Railway Company, could be withdrawn without the violation of any contract between the State and plaintiff in error; and the act of March 7th, 1879, so far as it is considered as having repealed the act of 1871, or as having withdrawn the exemption from taxation from the Chesapeake and Ohio Railway Company, is therefore constitutional and valid.

The same may be said of the act of February 4th, 1879, so far as it makes such repeal or withdrawal.

The case of Railroad Company against Georgia, already quoted from so elaborately, is conclusive of this proposition. There this court held that by the consolidation of two railroad companies the original companies were dissolved, and a new corporation was thereby created, and that such new corporation became subject to the law then in force.

True, in that case the dissolution of the old companies was brought about by the consolidation of two companies, but the fact was the same; the dissolution was accomplished, and the new corporation sprang into existence. There the case turned on the question, "Was there a dissolution of the old company, and did the act of the Legislature authorizing the consolidation create a new corporation?" The question was determined in the affirmative. Here the act, in terms, makes the dissolution of the old company upon the conveyance of its works and property, and expressly creates a corporation of the purchaser.

It is respectfully submitted that this last case, decided by the unanimous opinion of this court, so late as its fall term, 1878, establishes beyond question this my fourth proposition.

Respectfully submitted by—

CORNELIUS C. WATTS,
Attorney-General of West Virginia,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 203.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOSEPH S. MILLER, Auditor of the State of West Virginia,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

JAMES H. FERGUSON,
Of Counsel.

MOORE & MOORE, PRINTERS, CHARLESTON, W. VA.

Supreme Court of the United States.

October Term, 1884.—No. 203.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JOSEPH S. MILLER, AUDITOR OF THE STATE OF WEST VIRGINIA, DEFENDANT IN ERROR.

In Error to the Supreme Court of Appeals of the State of West Virginia.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

William H. Hogeman, Esq., the counsel of the plaintiff in error, residing in West Virginia, having recently died, and having been selected to fill the vacancy created by his death, I have ventured at this late day to formulate the following suggestions for the consideration of the Court in the decision of this very important case, and respectfully ask the permission of this Honorable Court to file the same as an additional brief for the plaintiff in error herein :

It was not long after the introduction of railroads into this country, until the absolute necessity of such a line of communication between tide-water in the east and the Ohio

River in the west, was seen and recognized by the statesmen of Virginia; and more than fifty years ago the Legislature of that state commenced a system of legislation looking to that end. In the space of a few years, the Legislature finding it impossible to secure the construction of railroads on private account, commenced the passage of laws authorizing the Board of Public Works of the state to subscribe on behalf of the state to the capital stock of certain specified railroad companies, sometimes two-fifths and sometimes three-fifths of the whole capital stock of such companies; and to pay such subscriptions the board was in all cases authorized to borrow money on the credit of the state, and to issue the bonds of the state therefor. This plan of building railroads encountered the violent opposition of a large majority of the people of the state living east of the blue ridge of mountains, and so persistent was this opposition that at the commencement of the war of the rebellion the railroad from tide water west toward the Ohio river lacked some two hundred and fifty miles of reaching that river.

In 1853, the Legislature finding it impossible to secure the construction of this line of railroad in any other way, passed, after the usual opposition,

"An ACT to authorize the Board of Public Works to construct a railroad from Covington to the Ohio river, on state account."

See Appendix to former brief in this case, p. 63.

Under this act about $500,000 had been expended in grading and masonry on that part of said road now within the state of West Virginia, and of all the millions expended by the state in the construction of railroads, this $500,000 was the only expenditure by the state for that purpose in that part of the state which now comprises West Virginia. And the money thus borrowed and expended constitutes with its interest nearly the whole of the debt of the state of Virginia, which hangs like a millstone about the necks of her people.

The construction of said railroad ceased with the commencement of the war above alluded to, and at the close of that war neither the state of West Virginia, which had in the meantime been created, nor the state of Virginia, had the financial ability even to assist in the completion of said railroad, much less to complete it on state account.

But the crippled, helpless and impoverished condition in which the two states found themselves at the end of that war, only rendered the completion of said railroad the more necessary and imperative for the building up of the waste places created by the war, by the development of their rich and I might say almost exhaustless mineral resources locked up in the fastnesses of their mountains.

And so the Legislature of each state went to work to contrive a scheme whereby the railroad might, as speedily as possible, be completed to the Ohio river.

The members of these Legislatures, fully appreciating the situation, and knowing that there was but one possible way in which the road could be built, which was to offer sufficient inducements to capitalists from other states to come and invest their money in the completion of this road, they passed the following acts, that is to say:

1. "An ACT to incorporate the Covington and Ohio Railroad Company."

Passed by the General assembly of Virginia, February 26, 1866.

See the Appendix aforesaid, p. 64.

2. "An ACT to incorporate the Covington and Ohio Railroad Company."

Passed by the Legislature of West Virginia, March 1, 1866.

See said Appendix, p. 35.

And among the special inducements held out to capitalists to put their money into the said railroad, by the state of Virginia, was the following, contained in section 7 of said first

named act: "And no taxation upon the property of the said company shall be imposed by the state, until the profit of the said company shall amount to ten per cent. a year on its capital;" and by the state of West Virginia the following, contained in section 7 of the act second above named: "And no taxation upon the property of the said company shall be imposed by the state, until the profits of the said company shall amount to ten per cent. on the capital of the company."

The exemption from taxation contained in the Virginia act amounted in all human probability to a perpetual exemption, for it is not at all probable that the time will ever come when the profits of the plaintiff in error will amount to ten per cent. *a year* on its capital.

But such is not the case with the exemption contained in the act of West Virginia. The point at which that exemption will cease will, if it has not already been reached, be reached in a reasonably short time. And these Legislatures did not, as is usual in such cases, stop with the offer of these large inducements to capitalists to come forward and engage in the building of this railroad; but they went further, and each of them appointed commissioners, and I might say, missionaries, to go out into the "high-ways and by-ways" and *offer* the benefits of the (this) charter "for the acceptance of capitalists, so as to secure the speediest and best construction, equipment and operation of said railroad."

See Virginia act, section 9, p. 66, Appendix aforesaid, and West Virginia act, section 9, p. 37, of said Appendix.

And the said commissioners were further authorized, by both of said acts and sections, "to make a contract with any parties who shall give the best terms and the most satisfactory assurances of capacity and responsibility," &c.

And in order to give to capitalists the most satisfactory assurance of the good faith in which these inducements were held out, each state appointed as such commissioners her

most trusted and distinguished citizens, and among them several who had deservedly obtained a national reputation.

These distinguished gentlemen accepted the appointment thus made, and entered vigorously upon the discharge of the duties imposed upon them, and at the end of one year from the date of their appointment they had been unable to find any acceptable party willing to undertake the building of said road.

And then at their respective sessions in the winter of 1867, the Legislature of each of said states passed an act entitled:

"An ACT to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river."

For the West Virginia act, see the Appendix aforesaid, p. 38; and for Virginia act, see same, p. 67.

By these acts it will be seen, the said Covington and Ohio Railroad Company was authorized to consolidate with any one or more of certain other companies therein named, and in case of such consolidation, it was provided that the companies which might so consolidate should constitute one corporation, and should "be vested with all the rights, privileges, franchises and property which may have been vested in either company prior to the act of consolidation, and shall be known as the Chesapeake and Ohio Railroad Company."

West Virginia act, sec. 2, p. 39, Appendix aforesaid; Virginia act, sec. 2, p. 67, of said Appendix.

It was further provided by said acts that the Virginia Central Railroad Company and the West Virginia Central Railway Company, or either of them, might contract with the Covington and Ohio Railroad Commissioners for the construction of the railroad from Covington to the Ohio river; and in that event, the company or companies so contracting should be known as the Chesapeake and Ohio Rail-

road Company, and should (shall) "be entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests and privileges which by this act are conferred upon the Chesapeake and Ohio Railroad Company when organized."

West Virginia act, sec. 14, p. 41, Appendix aforesaid.
Virginia act, sec. 15, p. 71, of said Appendix.

And to complete the additional inducements held out to capitalists to undertake the building of said road, it was provided by the West Virginia act, sec. 13, p. 41, of said Appendix, and by the Virginia act, sec. 14, p. 70, of said Appendix, that the said Chesapeake and Ohio Railroad Company might purchase the stock held by the state of Virginia in the companies therein named, and pay for the same in the bonds of the state of Virginia.

With these additional inducements to offer, the said commissioners again went out in search of some party who would accept the liberal terms offered by the two states, and it was not until the 31st day of August, 1868, that they were able to find an acceptable party willing to enter into a contract to build said railroad upon the terms so offered. In the meantime, certain capitalists from the north had purchased the stock of the Virginia Central Railroad Company to an extent sufficient to enable said company to "give the best terms and the most satisfactory assurances of capacity and responsibility," as required by the charter of the said Covington and Ohio Railroad Company, and on the day last named a contract was entered into for the completion of said railroad, by and between the commissioners of Virginia and West Virginia and the said Virginia Central Railroad Company, which contract, as a matter of precaution, was ratified, approved and confirmed by an act of the Legislature of West Virginia, passed January 26th, 1870. This act contains a copy of said contract, and so far as it relates to said contract is as follows:

"An ACT confirming and amending the charter of the Chesapeake and Ohio Railroad Company.

Passed January 26, 1870.

Be it enacted by the Legislature of West Virginia:

1. That the contract, dated August thirty-first, eighteen hundred and sixty-eight, made by commissioners of Virginia and West Virginia with the Virginia Central Railroad Company, by which the Chesapeake and Ohio Railroad Company was formed, and under which it has been organized, be and the same is hereby approved, ratified and confirmed as follows:

Contract with Commissioners for completing the Covington and Ohio Railroad.

The parties to the contract are:

First. The commissioners of the state of Virginia under the following acts of the General Assembly, viz: 1st, "An act to incorporate the Covington and Ohio Railroad Company," passed February twenty-sixth, eighteen hundred and sixty-six. 2nd, "An act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river," passed March first, eighteen hundred and sixty-seven.

Second. The commissioners of the state of West Virginia, under the following acts of the Legislature, viz: 1st, "An act to incorporate the Covington and Ohio Railroad Company," passed March first, eighteen hundred and sixty-six. 2d, "An act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river," passed February twenty-sixth, eighteen hundred and sixty-seven. 3d, "An act to amend and re-enact the fifteenth section of an act providing for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river, passed February twenty-sixth, eighteen hundred and sixty-seven," passed February sixth, eighteen hundred and sixty-eight.

Third. The Virginia Central Railroad Company.

The said commissioners of Virginia and West Virginia, by virtue of the authority given them by the statutes already referred to, and in order to secure the speediest and best construction, equipment and operation of the said railroad

from Covington to the Ohio river, according to the true intent and meaning of the said statutes, have contracted therefor with the said Virginia Central Railroad Company as the party giving the best terms and the most satisfactory assurances of having the capital, capacity and responsibility contemplated and required by the said statutes, and have introduced into the said contract the following additional stipulation, proposed by the stockholders of the said Virginia Central Railroad Company in general meeting, on the twenty-ninth day of November, eighteen hundred and sixty-seven, and accepted by the said commissioners as being for the benefit of their respective states and in furtherance of the purposes declared by the Legislature aforesaid, viz:

I. The work to be commenced and completed in the time and manner provided in the charter.

II. The company to guarantee four per cent. semi-annual dividends upon any stock which may be subscribed for the construction of said road, after the completion of the road to the Ohio river, and in the meantime said stock shall be preferred in any dividends which shall be declared by the company, to an extent not exceeding four per cent. semi-annually.

III. The company to borrow such sums of money at a rate of interest not exceeding eight per cent. per annum, as may be necessary, in addition to the funds arising from stock subscriptions for the completion of said road, and to execute a lien on its property and resources to secure the payment of the principal and interest of such loans: Provided, that subscriptions may be received to be applied to the construction of the work continuously from either end of the line.

IV. The company may guarantee the payment of principal and interest of bonds of cities and counties, receivable in payment of subscription to stock.

V. That bonds of cities and counties at ninety cents on the dollar, and bearing eight per cent. per annum interest, convertable into preferred stock, be received in payment of subscription to stock.

VI. Nothing contained in any contract made by this company shall have the effect to deprive the present creditors of the company of their claims for satisfaction out of the present property of the company, and it shall be the duty of the president and directors, before executing any further lien on the present property of the company, to secure by mortgage

any portion of the funded or floating debt, not heretofore so secured, that cannot be promptly paid off in the ordinary administration of the affairs of the company.

And the said Virginia Central Railroad Company having undertaken and contracted to construct the said railroad, on the terms and conditions aforesaid, it is hereby declared and certified that the said company shall hereafter be known as 'The Chesapeake and Ohio Railroad Company,' and is entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests and privileges which, by the statutes aforesaid, are conferred upon the Chesapeake and Ohio Railroad Company, when organized.

In testimony whereof, the commissioners of Virginia and West Virginia have set their hands and seals; and the said Virginia Central Railroad Company has caused the corporate seal of the company to be affixed, with the signature of Edward Fontaine, president of said company, this thirty-first day of August, eighteen hundred and sixty-eight.

JOHN B. BALDWIN, [L. S.]
GEORGE W. BOLLING, [L. S.]
THOMAS S. FLOURNOY, [L. S.]
WM. J. ROBERTSON, [L. S.]
Commissioners of Virginia.

JAMES BURLEY, [L. S.]
Z. D. RAMSDELL, [L. S.]
JOEL MCPHERSON, [L. S.]
JOHN S. CUNNINGHAM, [L. S.]
Commissioners of West Virginia.

E. FONTAINE,
President of the Va. Central Railroad Company.

2. That the Chesapeake and Ohio Railroad Company, formed and organized under said contract, shall have all the rights, benefits and privileges, and be subject to all the duties and responsibilities provided and declared in the said contract, and in the legislation of the states of Virginia and West Virginia, therein referred to; except only that the said company shall be allowed for the completion of the road from Charleston, in the county of Kanawha, to the mouth of Sandy, in the county of Wayne, the same time that is given by the charter for completing the other portions of the work within this state."

Under this contract, so made, ratified and confirmed, the said Chesapeake and Ohio Railroad Company constructed and completed the said railroad to the city of Huntington, on the Ohio river, within the time required by the charter of the Covington and Ohio Railroad Company; which charter did not designate any point on the Ohio river as the terminus of said railroad.

But by section 4 of the West Virginia act of 1867, p. 39 of the Appendix aforesaid, it was provided that said company might select the mouth of the Big Sandy river, or the mouth of the Great Kanawha river, as the Ohio river terminus of its railroad.

And as said road was not completed to the mouth of either of said rivers within the time fixed by said charter, a question arose as to whether or not the charter of the said company was forfeited for that reason. And to settle this question an act was passed by the Legislature of West Virginia, on the 20th day of February, 1877, releasing the said company from any forfeiture which might have occurred for the cause above stated, or for any other cause; which act is as follows:

"WHEREAS, It is claimed by persons not in the interest of the Chesapeake and Ohio Railroad Company that the charter of said company has been forfeited by reason of the failure of said company to complete its railroad to the mouth of the Big Sandy river, in the county of Wayne, within the time required by its contract; and, whereas, it is not deemed expedient to enforce such forfeiture, if it has occurred as claimed; therefore,

Be it enacted by the Legislature of West Virginia:

1. That the Chesapeake and Ohio Railroad Company be and the same is hereby released from any forfeiture of its charter that may have occurred for the cause stated in the preamble, or for any other cause, and said charter shall be and remain in full force and effect to the same extent as if no such forfeiture had occurred, if, in fact, any such forfeiture has occurred. But the Legislature expressly reserves the right, by a general law applicable to all the railroads in the

state, to regulate the charges for freights and passengers transported over the railroad of the said company.

2. That subject to the provisions of the preceding section, the second section of the act passed January twenty-sixth, one thousand eight hundred and seventy, entitled "an act confirming and amending the charter of the Chesapeake and Ohio Railroad Company," be and the same is hereby amended and re-enacted so as to read as follows:

'2. That the Chesapeake and Ohio Railroad Company, formed and organized under said contract, shall have all the rights, benefits and privileges, and be subject to all the duties and responsibilities provided for and declared in the said contract, and in the legislation of the states of Virginia and West Virginia therein referred to, except only that the said company shall be allowed, for the completion of that part of its railroad from Huntington, in the county of Cabell, to Big Sandy river, in the county of Wayne, until the first day of January, one thousand eight hundred and eighty two; and it shall be the duty of said company to so complete its said road within that period. *Provided*, That the terminus of said railroad on the Big Sandy river aforesaid, may be at any point thereon not above that at which its railroad bridge across said river has been located.'"

The passage of this act was not asked for by the Chesapeake and Ohio Railroad Company, but its passage was entirely voluntary on the part of the Legislature, in order to settle what might, in the future, embarrass the further construction of said railroad; although it was not believed at the time, by any well informed person, that the charter of said company had been forfeited, and no steps had been taken to enforce the forfeiture, if any had occurred.

By reference to the said contract, so made as aforesaid, as well as to the said act of February 26, 1867, section 7, it will be seen that the said Chesapeake and Ohio Railroad Company was authorized to borrow money for the completion of its railroad, "and to execute a lien on its property and resources to secure the payment of the principal and interest of such loans." And the said company did borrow large sums of money to be used in the con-

struction of its said railroad, and to secure the payment thereof, executed sundry deeds of trust and mortgages upon its property and resources. The said company, prior to July, 1878, made default in the payment of the interest on the bonds secured by said deeds of trust and mortgages, and by reason thereof, said deeds of trust and mortgages were foreclosed, and the mortgaged premises sold under the decrees of foreclosure, and purchased by the gentlemen named in the original brief filed herein, and who had furnished the principal part of the money used in the construction of said railroad from Covington to the Ohio river. And on the day last named the property, rights, privileges and franchises so sold were conveyed to the said purchasers thereof. And thereupon they became a corporation under the name of the Chesapeake and Ohio Railway Company.

At the date of this conveyance the said railroad had not been constructed between the said city of Huntington and the mouth of the said Big Sandy river, said company having selected mouth of that river as the terminus of said railroad, and under the provisions of section 2 of said act of February 20, 1877, the plaintiff in error, the Chesapeake and Ohio Railway Company, proceeded to the complete execution of the contract aforesaid, and did, in pursuance of said contract, and of the act last aforesaid, complete the construction thereof from Huntington to Big Sandy prior to the first day of January, 1882.

At the date of the charter of the Covington and Ohio Railroad Company, as well as at the date of the contract aforesaid, the Code of Virginia of 1860 was in force in the state of West Virginia, as the law of said state, and so remained until the first day of April, 1869, when it was supplanted by the Code of West Virginia.

Sections 28, 29, 30 and 31 of chapter 61 of said Code of Virginia provided as follows:

"28. If a sale be made under a deed of trust or mortgage,

executed by a company on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation, by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the court in which the conveyance shall be recorded.

29. The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties, as would have been had or should have been performed, by the first company but for such sale and conveyance; save only that the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of or claims against the said first company, which may not be expressly assumed in the contract of purchase, and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding together the amount of stock in the first company at the time of the sale, and assign the same in a book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for two weeks in a newspaper.

30. The debts due to and by, and claims against, the said first company mentioned in the preceding section, shall be subject to the provisions contained in the *thirtieth* section of the fifty-sixth chapter, and the said company, notwithstanding its dissolution aforesaid, shall, as to said debts and claims, have the power and perform the duties prescribed by that section.

Sales under decree of court; board of public works authorized to purchase for state; notice of sale.

31. A sale of the works and property of a company, made under decree of a court having competent jurisdiction, shall be held by the purchaser thereof, subject to all the provisions of the *three preceding sections*, so far as the same may be applicable to such sale. The board of public works shall be and are hereby authorized and directed to attend, either in person or by agent duly appointed by said board, the sale of any work of internal improvement in which the state is a stockholder or otherwise interested, whether such sale be made by virtue of mortgage, judgment or other lien, and that said board be authorized to purchase, on the part and for the use of the commonwealth, any such public work so offered for sale, if in the judgment of said board of public works the interest of the state would be protected or promoted thereby. No sale of any work of internal improvement, in which the state is a stockholder or otherwise interested, shall take place whether by virtue of mortgage, trust, judgment, decree or other lien, without ninety days' notice in the principal newspapers in the city of Richmond and in the local newspapers of the county wherein such improvement is situated, and further, without ninety days' notice served on the board of public works of this state by the person or persons authorized to make the sale."

By some oversight of the revisors of the Code of West Virginia, this chapter 61 of the Code of Virginia was not incorporated into the Code of West Virginia, and the omission was not discovered until 1871, and on the 18th day of February of that year, the Legislature of West Virginia passed an act as follows:

"CHAPTER LXX.

Be it enacted by the Legislature of West Virginia:

1. If a sale be made under a deed of trust or mortgage, executed by a railroad or other internal improvement company in this state, on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of

making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them, and recorded in the recorder's office of any county wherein the property so sold, or any part thereof, is situated, or where said conveyance is recorded.

2. The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had, or should have been performed by the first company, but for such sale and conveyance; save only that the corporation so created shall not be entitled to debts due to the first company, and shall not be liable for any debts of, or claims against, the said first company, which may not be expressly assumed in the contract of purchase; and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he, or his assigns, may create so many shares of stock therein as he or they may think proper, not exceeding, together, the amount of stock in the first company at the time of the sale, and assign the same in a book kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for four successive weeks in a newspaper printed in each county in the state wherein said corporation may do business.

3. The debts due to and by, and claims against, the said first company mentioned in the preceding section, shall be subject to the provisions contained in the seventh section of chapter fifty-two of the Code.

4. This Act shall not apply to any sales heretofore made, or any suits now pending in regard to such sales."

This act, it will be seen, failed to provide for a sale made under a decree of foreclosure, and to remedy this defect the

Legislature, on the 20th day of February, 1877, passed an act as follows:

"Be it enacted by the Legislature of West Virginia:

That in all cases where a mortgage or deed of trust has been executed upon the works and property of a railroad company or other internal improvement company, the provisions of chapter seventy of the acts of one thousand eight hundred and seventy-one shall be applicable to a sale of said property made under a decree of a court having jurisdiction in the case, and the purchaser at such sale shall have all the rights and privileges and be subject to all the responsibilities provided for in said chapter."

And these two last named acts were in force at the time of the decree of foreclosure, and of the sales made thereunder above referred to, and at the time of the conveyance of the said mortgaged property, to the said purchaser thereof as aforesaid.

It is not disputed, as I understand it, that under and by virtue of the several acts aforesaid, and the contract aforesaid, made in pursuance of said acts, the Chesapeake & Ohio Railroad Company was entitled to the exemption from taxation provided for in the charter of the Covington & Ohio Railroad Company, if the Legislature of West Virginia had the power under the constitution of the state to grant such exemption. But it is contended on the part of the defendant in error:

1. That so much of section 7 of the charter of the Covington & Ohio Railroad Company, granted by the state of West Virginia, as provides that "no taxation upon the property of the said company shall be imposed by the state, until the profits of said company shall amount to ten per cent. on the capital of the company," is unconstitutional and void.

2. That if the exemption was constitutional as to the Chesapeake & Ohio Railroad Company, the immunity from taxation enjoyed by the said company did not pass to the

plaintiff in error when it became a corporation, as aforesaid; and,

3. That even if said exemption was constitutional, the Legislature had the right to repeal it, as was done in 1869.

All of these contentions of the defendant in error are controverted by the plaintiff in error. And on the contrary thereof, we assert:

I.

That the exemption from taxation contained in the section alluded to, was a legitimate and proper exercise of legislative power under the then constitution of the state. In regard to taxation, that constitution, article 8, section 1, provided as follows:

"1. Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious or charitable purposes, and public property, may, by law, be exempted from taxation."

And now as to the proper construction of this section, it is, with deference, submitted:

1. That it does *not* require *all* property to be taxed, outside of that which it *provides* may be exempted.

2. That it is not self executing, but requires legislation to carry it into effect.

3. That under it, before any property can be taxed, its taxable value *must* be ascertained as the Legislature may direct; and that if any property is so situated as, in the opinion of the Legislature, to have no taxable value, it may, for the time being, be exempted from taxation. And,

4. That the exemption intended to be provided for in the section, is an absolute and perpetual exemption, and not a mere suspension of the exercise of the taxing power as to the property named, until it should acquire a taxable value, as was the case of the exemption provided for in the section in question contained in the charter of the Covington and Ohio Railroad Company.

Great lines of railroad differ from any other species of property coming within the taxing power of the Legislature. It requires years for their construction, and during all that time they are a continual drain upon their owners, with no return of profits. And who, without any law upon the subject, would think of assessing for taxation its grading and masonry, and the tunnels bored through the mountains, before any thing further was done? And who, under like circumstances, would think of assessing for taxation the ties and rails brought upon the ground, before a single tie or a yard of rail was laid?

And who, I ask, can successfully deny to the Legislature of the state, the right, *under the Constitution*, to step in and say that railroad property thus situated has no taxable value, and shall, for the time being, be exempt from taxation? And if the Legislature can do this, which it is submitted with great confidence it may do, it is further submitted, with equal confidence, that it may also provide that the exercise of the taxing power as to such property, may, in any given case, be suspended until the profits of the company shall amount, in the aggregate, to ten per cent. of its capital, as was done in this case.

Counsel for defendant in error has been at great pains to search out the provisions of the constitutions of other states, which he claims are, in legal effect, identical with that of West Virginia, and the decisions thereunder, to support the decision of the state court in this case; but, it is submitted, without very great success.

1. *The Constitution of Ohio.*

Section 2 of article 12, leaving out that part relating to exemption, reads as follows:

"Laws shall be passed taxing, by a uniform rule, all moneies, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money."

In order to aid the comparison, the section of the West Virginia constitution in question is here again inserted:

"Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property, *from which a tax may be collected*, shall be taxed higher than any other species of property of equal value."

The italics in the quotation are mine, and the words italicized, I submit, are the key to the intention of the framers of the constitution in the adoption of this section.

Take the whole of the section quoted together, and two things are apparent:

1. That it is left to the Legislature to prescribe the subjects of taxation; and,

2. That when so prescribed, the taxes levied thereon shall be equal and uniform throughout the state.

The Ohio constitution is the exact reverse of this. Its provisions are mandatory, that "laws *shall be passed*, taxing by a uniform rule," &c. It contains no provisions and uses no language which are the equivalent of the provisions and language contained in the constitution of West Virginia.

And while it may be true, that under the wording of that constitution no exemption from taxation could have been allowed in the absence of a special provision to that effect, such, it is submitted, is not the case under the constitution of West Virginia.

And the mandate of the Ohio constitution takes in investments in stock and in joint stock companies, which of course included railroads. But the framers of that constitution did not content themselves with this strict mandatory provision, as will be seen by section 4 of article 13 of that constitution, which provides as follows:

"The property of corporations now existing or hereafter created, shall forever be subject to taxation the same as the property of individuals."

This, it is submitted, ends all analogy between the provisions of these constitutions on the subject of taxation.

2. *Constitution of California.*

Section 13 of article 11 provides as follows:

"Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law."

This section contains in two sentences what is contained in the section quoted from the West Virginia constitution in one sentence.

The first sentence provides simply for uniformity in taxation.

The second provides that all property in the state *shall be taxed*, &c., and ends, so far as taxation is concerned, as above quoted. It does not contain the other provisions of the West Virginia constitution, that "no one species of property *from which a tax may be collected*, shall be taxed higher than any other species of property of equal value."

The reasoning of the state court in their decision of this case, wherein they reconstruct the first sentence of the section in question in this suit, and make it read like the above section of the constitution of California, is, I submit, a total misconception of its meaning.

This very material difference in the constitution of Cali-

fornia from that of West Virginia, renders the decisions of the courts of that state inapplicable to this case.

3. *Constitution of Arkansas.*

The section quoted from this constitution by the counsel for the defendant in error, is a literal copy of that quoted by him from the constitution of Ohio, and hereinabove repeated. Therefore, what has been said in regard to the Ohio constitution, applies with equal force to this. The section quoted from this constitution is section 2 of article 10 of the constitution of 1868, and the same constitution, article 5, section 48, among other things provides that "the property of corporations now existing or hereafter created, shall forever be subject to taxation the same as the property of individuals." Thus incorporating into that constitution the same identical provision quoted above from the Ohio constitution.

And yet, in the face of all this, the Supreme Court of Arkansas, in the case of Oliver *vs.* the Memphis and Little Rock Railroad Company, decided that the exemption from taxation contained in the charter of that company granted in 1853, was a contract which the state could not abrogate, even by the constitutional provision relied on by the defendant in error.

30 Arkansas R., 128.

The reference of the counsel to the constitution of Iowa needs no labored reply, as the exemption held to be invalid in the case referred to, was in plain violation of the provision of the constitution quoted. The constitution of West Virginia contains no such provision.

4. *Constitution of Illinois.*

This constitution provides that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his or her property."

It would seem that no one would pretend that this section of that constitution was, in the slightest degree, analogous to the constitution of this state on the same subject, as it is plainly mandatory that *all* property of *every* description shall be taxed.

And yet, it has been settled by the Supreme Court of that state, that this provision of their constitution does not prohibit the Legislature from commuting with individuals or corporations the burdens of taxation for what they may deem a sufficient consideration.

Illinois Central Railroad *vs.* County of McLean, 17 Illinois, 291.

Hunsaker *vs.* Wright, 30 *Id.*, 146.

Neustadt *vs.* Illinois Central Railroad, 31 *Id.*, 484.

And these decisions have met the approval of this court in the case of Chicago *vs* Sheldon, 9 Wallace, 50, 55.

It is therefore submitted that both upon reason and authority the Legislature of West Virginia had the right, under the constitution of the state, to grant the immunity from taxation contained in the 7th section of the charter of the said Covington and Ohio Railroad Company, and that the exemption from taxation so provided for, taken in connection with the subsequent legislation herein before referred to, and the express contract so entered into between the Commissioners of Virginia and West Virginia and the Virginia Central Railroad Company, under which the Chesapeake and Ohio Railroad Company built its railroad from Covington to the city of Huntington, on the Ohio river, constituted a contract between the states named and the said railroad company, which was beyond the power of the Legislature to annul.

In addition to this, we have the presumption in favor of the constitutionality of the act allowing this exemption, which by all the authorities exists in all cases, and it can hardly be said in this case that the unconstitutionality of this exemp-

tion is so clear and manifest as to leave no doubt upon the subject.

Again, we have the contemporaneous and continued construction, by the legislative department of the state, that the section of the constitution in question did not prohibit the exemption of property not named among the several items enumerated in the section, which might be exempted from taxation, from 1863 to 1879, when the Legislature of the state, for the first time, sought to repudiate its own solemn contract under which said railroad was built.

West Virginia became a state under the constitution of 1863, on the 20th day of June, 1863, and on that same day the first Legislature of the state assembled and commenced the necessary legislation to carry the several provisions of the constitution into effect.

That Legislature, as the official records of the state show, was composed, to a considerable extent, of the leading and most able members of the convention who framed the constitution, and among them the gentleman who drafted the section of the constitution in question, in regard to taxation, and on the third day of December, 1863, an act was passed which was drawn by this same gentleman, to carry into effect the provisions of the constitution in regard to taxation. Section 42 of which act is as follows:

"42. All personal property described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say: All public and family libraries; all books, apparatus and furniture belonging to colleges, incorporated academies and free schools, and used for college and school purposes; or to the public institutions for the education of the deaf and dumb and the blind, or houses of refuge; or to the lunatic asylum; and all personal property belonging to orphan asylums, overseers of the poor in their official capacity, and exclusively to the state, or to any county or township therein; all fire engines or other implements for the extinguishment of fires; all agricultural productions grown directly from the soil, and the natural increase in number

and the products of live stock during the year previous to the 1st day of February in any year, when such products remain unsold in the possession of the producer on the said first day of February; and all manufactured articles and products of mechanical skill or labor produced in this state during the year previous to the said first day of February, and remaining unsold in the hands of the producer on that day."

This section, it will be seen, exempted from taxation, in addition to the property enumerated in the constitution, the following:

Family libraries, all agricultural productions grown directly from the soil, and the natural increase in number and the products of live stock during the year previous to the first day of February in any year, when such products remained unsold in the hands of the producer on that day; and all manufactured articles and products of mechanical skill or labor produced in the state during the year previous to the said first day of February, and remaining unsold in the hands of the producer on that day.

The same act, section 47, providing for the taxation of bonds and other evidences of debt and liquidated claims, provides also that the holder of such bonds, debts and claims, may deduct "from the aggregate amount thereof the amount of all such bonds, securities, claims and demands," which he may owe to others as principal debtor; and that he shall only pay taxes on the residue, if any, due him on the said first day of February.

At the same session of the Legislature, the gentleman referred to was, on account of his great legal learning and his skill and ability in the drafting of statutes, appointed by an act passed October 27th, 1863, to prepare a code of laws for the state; and the sum of $5000.00 was appropriated to pay him for the work. Under this contract he prepared chapters one to fifty-two inclusive, of the Code of West Vir-

ginia, when, on account of failing health, he was relieved from the further execution of his said contract, and two other gentlemen were appointed to complete the work provided for.

Among the chapters prepared by him was chapter 29 of the Code of West Virginia, providing for the assessment of taxes. And section 43 of that chapter found in said Code, on pages 161, 162, is precisely as it was prepared by him, and contains the identical exemptions found in the act of 1863, with the produce of mines, salt wells and oil wells added. This chapter, with all other chapters of the Code, was passed upon by a committee of revision of five members appointed by the Legislature, who sat in the recess of the Legislature and carefully scrutinized the provisions of each chapter before reporting them to the Legislature for its action; and both this section and the section in regard to the taxation of bonds, notes, &c., were reported precisely as so prepared, and passed by the Legislature.

Previous to this, however, on the 26th of February, 1868, an act amending and re-enacting the said section 42 of the act of 1863, and that alone, was passed precisely as it was in the original section, except that it added the words, "donation and money," to the exemptions as to colleges, &c.

All this took place under the constitution of 1863.

And without going into detail, the Legislature of the state during the existence of the constitution of 1863, passed some twenty different acts exempting the property of railroad and other internal improvement companies from taxation until their net earnings should amount to a fixed per cent., ranging from six to ten per cent. on their capital, but generally the latter.

See Appendix to former brief, pp. 51 to 58 inclusive.

And two of these acts, viz: That in relation to the West Virginia Central Railway Company, (Appendix to former brief, p. 56,) and that in relation to the Buchanan Mineral Railroad Company, (Appendix, p. 58,) substantially re-affirm the exemption enjoyed by the Chesapeake and Ohio Rail-

road Company, by granting to these several companies "all the rights that are granted to the Chesapeake and Ohio Railroad on the question of taxation."

And in 1872, the last Legislature which sat under the constitution of 1863, passed "An act extending the connections of the Chesapeake and Ohio Railroad," section 3 of which act provides, among other things, as follows:

"Provided, this section shall not be so construed as to release the said Chesapeake and Ohio Railroad Company from any contract entered into by said company, with the commissioners of Virginia and West Virginia."

Thereby, in the strongest terms, re-affirming the said contract, and recognizing the Chesapeake and Ohio Railroad Company as one of the parties making it.

And now, it is respectfully submitted that, if the contemporaneous and continued construction of a constitutional provision can in any case settle that construction in a given way, the construction of the section of the West Virginia constitution in question in this case, is settled in favor of the validity of the act granting the exemption from taxation claimed in this case. But this is not all in this line of argument.

In 1872 a new constitution for the state of West Virginia was adopted, and it is true, as stated by the counsel for the defendant in error, that various propositions were made and acted upon in the convention which framed that constitution in reference to this very question of the exemption of property from taxation, which resulted finally in the adoption of section 1 of article 10, as follows:

"Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value;" using the identical language, and

putting it in the same form of the former constitution. Then follows the clause in regard to exemptions, as in the constitution of 1863, with cemeteries added.

The members of the convention which framed this constitution knew perfectly well the construction which had uniformly, and without an exception, been placed upon the section in question in the constitution of 1863, and that under it the Legislature had time and again exempted the property of railroad companies, for a limited period, and other property not named in the list of property mentioned in the constitution of 1863 for exemption, absolutely, from taxation; and yet, with all this knowledge, they deliberately adopted and inserted in the constitution they were framing, the very language which had been so construed and acted upon by the legislative department of the government.

And it is now submitted, with great confidence, that the members of that convention, in adopting the language of the constitution of 1863 in regard to taxation, intended to, and did adopt the construction so placed upon it. And this conclusion is greatly strengthened by reference to article 11 of the constitution of 1872, on corporations. In this article there are five sections devoted exclusively to railroads, and containing very stringent provisions in relation thereto, and among other things providing as follows:

"8. The rolling stock, and all other movable property, belonging to any railroad company or corporation in this state, shall be considered personal property, and shall be liable to execution and sale, in the same manner as the property of individuals; and the Legislature shall pass no law *exempting any such property from execution and sale.*"

Again the italics are mine.

Now, if the framers of this provision did not understand the language used in the constitution of 1863, and again in the one they were framing, in regard to taxation, as allowing the exemption of railroad property from taxation, why did

they insert this provision in regard to its exemption from sale and execution?

Upon the theory that no property of any sort could be exempted from taxation except that enumerated in the constitution, they had already provided against the exemption of railroad property from execution, by section 48 of article 6 of their constitution, which limited the right of the Legislature to exempt property from execution and sale to a homestead of the value of $1000.00, and personal property of the value of $200.00, in the hands of a husband or parent, or the infant children of deceased parents. But it is clear that, notwithstanding this, the Legislature, in their opinion, *had* the power to exempt railroad property from execution and sale, and hence the prohibition against the exercise of that power.

And again, if the framers of the constitution, with full knowledge of the fact that every Legislature which had met in the state, from and including that of 1866 to that of 1872, which was in session at the same time and in the same city with the said constitutional convention, had exempted the property of railroad companies from taxation, as before stated, had intended to prevent such exemptions in the future, why did they not follow the example set by the framers of the constitutions of Ohio and Arkansas, and provide that "the property of corporations now existing or hereafter created, shall forever be subject to taxation the same as the property of individuals," at the same time, and in the same article in which they provided that such property should not be exempted from execution?

The conclusion is irresistable that the reason why they did not do so was because they did not intend to prohibit the Legislature from granting such exemptions, when in its wisdom it saw proper to do so.

And finally, there is, in this same article 11, section 3, a proviso as follows:

"*Provided*, That nothing herein shall prevent the execution of any *bona fide* contract heretofore lawfully made in relation to any existing charter or grant in this state."

This provision was inserted by way of amendment, on the motion of Hon. D. D. T. Farnsworth, (see Journal of Convention, page 245,) and was expressly intended by him to save a contract made by him and the other commissioners, for the construction of the West Virginia Central Railway Company's railroad, in pursuance of the act found in the Appendix to the brief heretofore filed, on pages 55, 56, whereby he, with the other gentlemen named as commissioners, was appointed to enter into a contract for the building of said railroad, under provisions similar to those contained in the charter of the Covington and Ohio Railroad, and which act provided as follows:

"And all the rights that are granted to the Chesapeake and Ohio Railroad on the question of taxation, shall also be granted to any company contracting under the provisions of this charter."

This proviso would, of course, extend as well to the contract for building the Chesapeake and Ohio railroad, as to that for which it was intended by the mover; and it is submitted that, under and by virtue of it, the said contract in pursuance of which the said Chesapeake and Ohio railroad was built, has the express sanction of the present constitution of the state.

No charters of railroad or other internal improvement companies have been granted under the constitution of 1872, for the reason that such charters are prohibited by section 1 of said article 11 of said constitution, but all such charters are granted under a general law enacted for the purpose. But in 1875, 1879 and 1881, chapter 29 of the Code of West Virginia, in relation to the assessment of taxes, was amended and re-enacted entire, with various changes and amendments, and in every instance agricultural products, the products and increase of live stock, the produce of mines, salt wells and

oil wells, and all manufactured articles and products of mechanical skill and labor, were exempted from taxation, precisely as they were under the constitution of 1863. And each of these acts was approved by the governor of the state, he being vested with the veto power by the constitution of 1872, which he did not have previously.

So that we now have the construction of the executive department of the government, as well as the legislative, in favor of the true meaning of the section of the constitution in question in this case. And it is a well known fact that no one ever questioned the constitutionality, or even the propriety, of the exemption of the property of the Chesapeake and Ohio Railroad from taxation, until in the year 1877, when the act of February 20, 1877, hereinbefore mentioned, releasing any forfeiture of the charter of said company which might have occurred, which had already passed the House of Delegates, was on its passage in the Senate.

On February 19, 1877, Senator Ferguson, of the county of Wayne, (not the writer of this brief,) moved to amend the bill as follows:

"Provided, further, that said railroad hereafter in each and every year shall be assessed and pay all state, school and other taxes levied by the state; and, also, all county and district taxes levied in the counties through which said railroad runs, under the provisions of the laws of this state for the assessment and collection of railroad taxes."

This amendment was rejected by the Senate, by a vote of five for and fifteen against it.

See Senate Journal of 1877, p. 210.

And then, again, this exemption had the sanction of the Legislature in the passage of this act without interfering with the exemption from taxation, at a time when the Legislature would have had, at least, an excuse for withdrawing that exemption as a condition of the revival of this charter, if it had been forfeited.

And now, I respectfully submit and insist, that if there

ever was a case in which the state should be held to its own solemn contract, this is that case.

Here we have not only the usual contract growing out of the act chartering the company, but we have the actual, formal contract, executed, signed, sealed and delivered by the state through her agents, the commissioners appointed to make it. And that, too, after these agents of the state had spent two whole years at the command of the state, in their efforts to find a party who could be prevailed upon to invest his capital in the building of this railroad for the benefit of the state.

This contract was entered into by the Chesapeake and Ohio Railroad Company in good faith, upon the terms thus offered by the state, one of which was that its property should be exempt from taxation until its profits amounted to ten per cent. in the aggregate upon its capital, and in the hope that under the terms so offered, it might in a reasonable time derive some benefit from its capital invested in the building of the road.

But if the decision of the state court in this case is permitted to stand, then these agents of the state, acting for and at the instance and express direction of the state, procured the execution of said contract by false, and as it turned out, fraudulent promises and inducements held out to the parties who put their money into the construction of said railroad upon the faith of these promises and inducements, and without which the contract so entered into would never have been made.

And now, in concluding what I have to say on this point, I submit that upon every consideration of justice and right, this contract so entered into should be held sacred and binding upon the state of West Virginia, and that said state should not be permitted to repudiate said contract, after standing by until the last part of this line of railroad, to-wit: that part between Huntington and the Big Sandy river was being constructed and well nigh completed by this plaintiff in error, the Chesapeake and Ohio *Railway* Company, under

the provisions of said contract, and of the said act of February, 1877, requiring said railroad to be completed to the Big Sandy river by the first day of January, 1882.

II.

That the plaintiff in error, under and by virtue of the sale and conveyance to it, as aforesaid, and of the several acts and the contract aforesaid, is entitled to the immunity from taxation provided for in the charter of the Covington and Ohio Railroad Company.

The point made by the counsel of the defendant in error, that by the sale and conveyance of the property, &c., of the Chesapeake and Ohio Railroad Company, the contract aforesaid, under which the railroad was constructed, ceased and determined on the 1st day of July, 1878, is, it is submitted, not well taken.

It may be true that the Chesapeake and Ohio *Railroad* Company was on that day dissolved, but the charter of the company and the contract made in pursuance thereof remained, and the plaintiff in error, at the same instant of time the old company was dissolved, became a corporation by the name of the Chesapeake and Ohio *Railway* Company; and as such, under and by virtue of the said acts of February 18, 1871, (Chapter 70,) and February 20, 1877, it *succeeded* "to all such franchises, rights and privileges," and was required to "perform all such duties as would have been had or should have been performed by the first company, but for such sale and conveyance."

Section 2 of said chapter 70 of the Acts of 1871.

This was precisely the law as it stood when the charter of the Covington and Ohio Railroad was granted, and when the Chesapeake and Ohio Railroad Company became a cor-

poration under and by virtue of the contract aforesaid, and which law became a part of said charter and contract.

Sections 28 to 31, Code of Virginia, inserted above.

And the fact of its virtual repeal by the adoption of the Code of West Virginia, as aforesaid, can have no effect in this case, inasmuch as it was restored before said sale, purchase and conveyance.

This law also added largely to the value of the securities executed by the Chesapeake and Ohio Railroad Company, in the form of deeds of trust and mortgages to secure its indebtedness to the holders of its bonds, and was a guarantee to the holders of these bonds, that upon a sale of the property, franchises, &c., of the Railroad Company, either by the trustee named in the mortgage or deed of trust, or under the decree of a court, they, or any other person purchasing said property, franchises, &c., might, at their option, become a corporation, by the simple act of taking to themselves a conveyance of the property, &c., purchased; and not only so, but that they should occupy the exact position under the charter of the old company formerly occupied by that company, and inherit all its franchises, *rights* and *privileges*, and among them an immunity from taxation, if that was one of the privileges enjoyed by the old company.

The force of this conclusion was so apparent to the counsel for the defendant in error that he has, I submit, exhausted his ingenuity in a fruitless endeavor to explain it away. It is not denied that the case of Morgan *vs.* Louisiana, 93 U. S., 223, cited by the counsel, propounds the law correctly, but it is emphatically denied that it sustains or even favors the position taken by the counsel in this case. And nothing is needed to demonstrate the truth of this denial but the language quoted by the counsel from that decision on pp. 32 and 33 of his brief. This quotation shows that the question in that case turned upon the proper meaning of the word "franchises," and not upon the meaning of the words "rights and

privileges." And the court in that case held and decided that immunity from taxation was not a "franchise," and could not be assigned by the use of that term. The court also reitterated the doctrine that immunity from taxation is a personal *privilege*, and cannot be transferred without express statutory direction. But it neither overruled nor questioned the case of Humphries *vs.* Pegues, 16 Wallace, 244, wherein this court decided that immunity from taxation *did pass* by a transfer of all the *rights, powers and privileges* of a railroad corporation.

And without multiplying authorities on this point, it is deemed sufficient to say that this decision of the court has never been overruled, or, so far as known, even questioned by this Honorable Court.

But the learned counsel seeks to destroy the force of the decision in Humphreys *vs.* Pegues, by pointing out a difference in the language used in that case from that used in the Code of Virginia of 1860, and in the statute of West Virginia of 1871.

He says, "In this case, *franchises*, rights and privileges are used, while in Humphreys *vs.* Pegues, *powers*, rights and privileges are the words employed."

I have tried to see, if possible, wherein the difference, in legal effect, lies between the words used in the two cases, and I am forced to confess that it is beyond my limited comprehension to do so.

The question, then, being settled, that immunity from taxation can and *does* pass under a transfer of all the *powers*, rights and privileges of a railroad corporation, it is submitted, as an inevitable consequence, that immunity from taxation can and *does* pass under a transfer of all the *franchises*, rights and privileges of a railroad corporation.

The word "powers" in no sense imports a privilege, while the word "franchise" is, in a sense, a privilege, and is, for the

purposes of this argument, the stronger and more apt word of the two.

And in this case, the plaintiff in error claims to have and possess, and, it is confidently submitted, *does* have and possess the immunity from taxation formerly had and possessed by the Chesapeake and Ohio Railroad Company, and that this immunity was transferred to it "by express statutory direction."

To establish this proposition beyond controversy, it is only necessary to read the first and second sections of chapter 70 of the Acts of 1871, and the act of February 20, 1877, found in a former part of this brief.

And it is submitted that under and by virtue of the express direction of these statutes the exemption from taxation enjoyed by the Chesapeake and Ohio Railroad Company, *did* pass to the plaintiff in error in this case, simultaneously with the dissolution of the old company.

And here it is material to inquire when and how the old company was dissolved, and the plaintiff in error, its successor, became a corporation? This inquiry is answered by the first section of chapter 70 of the Acts of 1871. This section provides, first, what property of a railroad company shall pass to a purchaser thereof by the conveyance provided for; and second, it provides as follows:

"Upon such conveyance to the purchaser the said company shall *ipso facto* be dissolved, and the said purchaser shall be a corporation by any name which may be set forth in said conveyance," &c.

And here let it be observed that the same act and the same instrument which dissolves the old company, incorporates the purchasers as its successor, and instanter it succeeds to "all such franchises, rights and privileges * * * * as would have been had by the first company, but for such sale and conveyance." The corporation thus created is also

thereby required to perform all such duties as should have been performed by the first company, but for such sale and conveyance, except as therein provided.

There was not, as already stated, a moment of time, under the provisions of this act, between the dissolution of the Chesapeake and Ohio Railroad Company and the incorporation of the plaintiff in error as its successor; and, therefore, the franchises, rights and privileges of the said Chesapeake and Ohio Railroad Company never became vested in the state, but passed out of the said company and into the said plaintiff in error, the moment the said conveyance was signed, sealed and delivered.

And in this, and several other particulars, this case is plainly distinguishable from the case of the Memphis and Little Rock Railroad Company (as reorganized) *vs.* Berry, *et al.*, lately decided by this court.

1. In 1853, when the Memphis and Little Rock Railroad Company was chartered, there was no law of the state in existence authorizing the purchasers of the property of a railroad company, at a judicial or other sale thereof, to become a corporation.

In the state of West Virginia such a statute was in existence when the Covington and Ohio Railroad was chartered in 1866, as well as when the contract under which "The Chesapeake and Ohio Railroad Company" became a corporation, was executed.

2. At the date of the first sale of the property of the Memphis and Little Rock Railroad Company in 1873, no such law was in existence in the state of Arkansas.

In the state of West Virginia, when the property of the Chesapeake and Ohio Railroad Company was sold, such a statute was in existence.

The first act passed by the Legislature of Arkansas authorizing the purchasers of the property of a railroad company to become a corporation, was passed in December, 1874, and the provisions of that statute on the subject were essen-

tially different from the statute of West Virginia on the same subject.

By that act, the purchasers of the property "and their associates" were authorized to "organize themselves into a body corporate, vested with all the corporate rights, liberties, privileges, immunities, powers and franchises of and concerning the railroad so sold, not in conflict with the provisions of the constitution of the state, as fully as the same were held, exercised and enjoyed by the corporation before such sale."

It will be seen that under this statute the purchasers of such property could only acquire such of the rights, privileges, immunities, &c., of the old company as were "not in conflict with the provisions of the constitution of the state."

It becomes material, therefore, to see what were the provisions of the constitution of the state of Arkansas at the date of the passage of said act.

The constitution of that state, at that date, had been adopted and took effect October 13th, 1874, but two months before the passage of this act.

Like the constitution of West Virginia of 1872, it provides that no special act conferring corporate powers shall be passed by the Legislature, but that thereafter all corporations shall be formed under general laws passed for the purpose; but, unlike the constitution of West Virginia, it further provides that such laws may, from time to time, be altered or repealed.

Upon the subject of taxation, that constitution contains the following provisions:

1. That all property subject to taxation, shall be taxed according to its value.

2. That public property used exclusively for public purposes, churches used as such, cemeteries used exclusively as such, school buildings and apparatus, libraries and grounds used exclusively for school purposes, and buildings and

grounds and materials used exclusively for public charity shall be exempt from taxation.

3. That all laws exempting any property, other than that above provided for, from taxation, shall be void; and,

4. That the power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state may be a party.

And the decision of the court in the case of the Memphis and Little Rock Railroad Company (as reorganized) *vs.* Berry, *et al.*, was that it was under this statute and constitution of 1874, the said company became a corporation, and that the rights, liberties, privileges, immunities, powers and franchises acquired by the purchasers of the property of the old company when they became a corporation, were governed and controlled by the provisions of the constitution and statute of 1874; and that, consequently, the immunity from taxation enjoyed by the old company under its charter of 1853, did not pass to the plaintiff in error in that case.

There can be no doubt as to the correctness of this decision, even if it was permissable to question it, which it is not.

But it is confidently submitted, that it in no way weakens or effects the claim of the plaintiff in error in this case to the immunity from taxation enjoyed by the Chesapeake and Ohio Railroad Company under its charter.

And there is still another and very important thing by which this case is distinguishable from the case above mentioned.

In that case, the plaintiff in error did not become a corporation under and by virtue of the deed of conveyance of the property of the old company to the purchasers thereof, as there was no law of the state allowing it to do so. The property in that case sold under the decree of the court, was conveyed, not to the bondholders, who *afterwards* became a corporation, but to Pierson, Mathews and Dow, in trust for these bondholders; and thereafter, on April 28, 1877, these

holders of the bonds of the old company executed articles of association, whereby they "organized themselves into a company, claiming to be a corporation under the name of 'The Memphis and Little Rock Railroad Company, as reorganized.'"

No such thing was done, or was necessary to be done, in this case. At the time of the conveyance of the property of the old company to the plaintiff in error in this case, there was a general law passed by the Legislature in obedience to the constitution of 1872, under which any number of persons not less than seven, might become a corporation for the purpose of constructing a railroad, by adopting and signing articles of incorporation containing the particulars therein prescribed, but the plaintiff in error was not under the necessity of adopting and signing such articles, and did not acquire its corporate powers under that law, but under the statutes aforesaid.

And the attention of the court is specially called to the fact already stated, that the corporation created by the sale and conveyance of the property of the old company, is required to "perform all such duties" as "should have been performed by the first company but for such sale and conveyance." The plaintiff in error became a corporation on the 1st day of July, 1878, the date of the deed to A. S. Hatch and others, at which time the said act of February 20, 1877, was in force, the second section of which act provides, among other things, as follows:

"2. That the Chesapeake and Ohio Railroad Company, formed and organized under said contract, shall have all the rights, benefits and privileges, and be subject to all the duties and responsibilities provided for and declared in the said contract, and in the legislation of the states of Virginia and West Virginia therein referred to, except only that the said company shall be allowed, for the completion of that part of its railroad from Huntington, in the county of Cabell, to Big

Sandy river, in the county of Wayne, until the first day of January, one thousand eight hundred and eighty-two; and it shall be the duty of said company to so complete its said road within that period."

By this section, it will be seen, that one of the duties which the Chesapeake and Ohio Railroad Company was especially required to perform, was to complete that part of its railroad between Huntington and the Big Sandy river by the first day of January, 1882, and this was one of the duties which the plaintiff in error was compelled to perform under the statutes giving it a corporate existence, and it did perform that duty as hereinbefore stated.

It would seem, therefore, that the right of the plaintiff in error to the exemption from taxation enjoyed by the Chesapeake and Ohio Railroad Company during its entire corporate existence, could hardly be seriously questioned.

III.

That the exemption from taxation granted to and enjoyed by the Chesapeake and Ohio Railroad Company, under and by virtue of the statutes and contract aforesaid, and which passed to the plaintiff in error as aforesaid, was not and is not subject to modification or repeal by the Legislature.

This exemption was not, as contended for by the counsel for the defendant in error, a mere voluntary exemption, and as such repealable. But, on the contrary, it was granted to said company by express statutory provisions, and by an express and formal contract, founded upon a valuable, adequate and meritorious consideration, and was, therefore, binding on both the states granting it.

Wilmington Railroad *vs.* Reid, 13 Wallace, 266, and numerous other authorities familiar to the court and bar, settle this question beyond dispute.

As to the authorities quoted by the counsel in support of

his position, it is submitted that none of them sustain him in his position in reference to this case.

Nor is it true, that by virtue of section 8 of chapter 53 of the Code of West Virginia, quoted by the counsel, the plaintiff in error held its charter subject to the power of the Legislature to alter or repeal it.

At the time that Code went into effect, April 1, 1869, railroad charters could only be granted by special act of the Legislature, under the provisions of the constitution of the state, but charters to numerous other joint stock companies could be and were granted, in the form of certificates of incorporation, under a general law passed for the purpose. These, and these alone, were the *charters* and *certificates* referred to in said section 8 of said chapter 53.

This section had no reference, and could have none, to any corporate authority obtained in the manner in which the plaintiff in error became a corporation, for two reasons:

1. Because, sections 28, 29, 30 and 31 of chapter 61 of the Code of Virginia, hereinbefore set forth, were omitted from the Code of West Virginia; and,

2. The plaintiff in error did not become a corporation by virtue of any charter granted by a special act of the Legislature, nor by any *certificate* of incorporation granted under the general law.

And again, this section of the Code can in no way affect the corporate rights and privileges of the plaintiff in error, because, at the time it took effect, the statutes and contract under which the exemption from taxation had been granted to the Chesapeake and Ohio Railroad Company, were in full force and effect, and by the subsequent legislation already referred to, this exemption passed to the plaintiff in error untrammeled by the section of the Code relied on by the counsel.

And in this connection, let it be borne in mind that in the

acts of 1866, passed by the Legislatures of Virginia and West Virginia, chartering the Covington and Ohio Railroad Company, no right or power was reserved to alter or repeal said charter in any respect whatever.

These subsequent statutes, passed, one in 1871, another in 1872, and two others in 1877, govern and control section 8 of chapter 53 of the Code of West Virginia, even if that section had been applicable to the chartered rights of the plaintiff in error, and are in no way controlled by it, and by force and effect of these statutes the exemption from taxation guaranteed and secured to the Chesapeake and Ohio Railroad Company by the express statutory provisions, and the express and formal contract aforesaid, are granted to and conferred upon the plaintiff in error without restriction or limitation.

It follows, therefore, I submit, that the acts of the Legislature of West Virginia passed in 1879, and relied on by the counsel of the defendant in error, so far as they repeal section 7 of the charter of the Covington and Ohio Railroad Company, and attempt to withdraw the exemption thereby granted, are, themselves, unconstitutional, null and void, as impairing or attempting to impair the obligation of the contract under which the plaintiff in error, then was, and still is, entitled to immunity from taxation on its corporate property.

I am advised that it will be claimed by the defendant in error that the exemption from taxation allowed by the charter of the Covington and Ohio Railroad Company applies, and was intended to apply, alone to taxation by the state, and does not extend to local taxation, the language of the exemption being that no taxation upon the property of the company shall be *imposed by the state*, &c.

All taxation, whether state, county, district or municipal, is, in contemplation of law, imposed by the state, the sovereign power, either directly or under its authority by the local tribunals, and this has always been the practical interpreta-

tion of this exemption, from 1866 until the present—none of the local authorities having at any time attempted to assess the property of said company with taxes.

It has also been the interpretation and understanding of the authorities of the Chesapeake and Ohio Railroad Company, and of the plaintiff in error, and in fact of every one else, from the time said exemption was granted until now, that it extended to local as well as to state taxation, and, without such understanding, it is not at all probable that the Chesapeake and Ohio Railroad Company would have entered into the contract to build the railroad.

It is, therefore, rather late in the day to raise that question now.

The words "imposed by the state," are, it is submitted, equivalent to the words, "imposed by or under the authority of the state."

And under the assessment laws, as they existed at the time of the passage of the act chartering the Covington and Ohio Railroad Company, and still exist, no property could be taxed for local purposes, not taxable for state purposes.

And, finally, it is submitted that the decree of the state court appealed from in this case should be reversed, and the injunction awarded by the judge of the circuit court of the state perpetuated.

JAMES H. FERGUSON,
Of Counsel for Plaintiff in Error.

114-176

SUPREME COURT OF THE UNITED STATES.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff in Error,

524

vs.

JOSEPH S. MILLER, AUDITOR, Defendant in Error.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

And now comes the Chesapeake and Ohio Railway Company, by Wm. J. Robertson and William H. Hogeman, its attorneys, and by leave of the Court, submits the following, by way of answer to the motion to be made on the 28th day of January, 1884, in said Court, on behalf of Joseph S. Miller, Auditor, &c., to advance the above entitled cause, now pending in said Court, to a final hearing at the present term of said Court:

FIRST. In no event would it be proper to comply with the suggestion contained in said motion to fix the 3d day of March next for the hearing of the above entitled cause. The record is very voluminous; is not yet printed; and the interval between the time when access to a printed copy of the record can be had by counsel, and the 3d day of March next, is wholly insufficient for a proper examination thereof and for the intelligent argument of the matters involved therein, on the 3d day of March next.

SECOND. The above entitled cause has now been pending in the Supreme Court of the United States for nearly two years; during all that time there was quite as much urgency, if any, as exists at this time, for an early hearing of the above entitled cause.

The cause in regular order, will doubtless be reached early in the next term of this court, and no greater inconvenience can result by abiding its regular call than must be suffered by litigants in general. The fact that no application to advance the case for two years, has been made, and no reason being assigned to advance it now that did not exist when the said cause came to this Court, makes it manifest that the reasons for which it is asked to advance the cause now, are not so urgent as to justify the Court in making an exception of this case, by preferring it over others. As will hereinafter appear, the decision of this case, one way or the other, will afford no considerable relief to the financial embarrassment of the State of West Virginia, and it is idle to say that any special session of the Legislature is dependent, in the slightest degree, upon the decision of this case.

THIRD. This case cannot, in any just sense, be considered one which comes within the rule permitting cases to be advanced which relate to and affect revenue or some matter of general public interest. It does not involve the construction of any general tax laws; the collection of revenue from any class of persons or corporations, or from any species of property; but involves simply the question whether the obligation of a contract made between the State of West Virginia and one single corporation, by which the property of that corporation was exempted from taxation, may be impaired and disregarded by the State, or is to be respected and observed according to its terms. The aggregate amount of all taxes involved in the above entitled cause does not exceed $27,927.40; and of this sum not exceeding $5,026.62 belongs, in any event, to the State of West Virginia; the balance all going to counties and other municipal sub-divisions of the State; and of this $5,026.62 not over two-thirds is applicable to the large deficit of hundreds of thousands of dollars admitted in the motion to exist in the Treasury of the State of West Virginia; and which deficit cannot properly be chargeable to the failure of the plaintiff in error to pay the taxes assessed upon its property, and has in all official documents been properly attributed to other causes.

While it it is not believed that the matters involved in other suits should have any influence in determining the present motion, it is admitted that there are other suits pending, in the courts of

original jurisdiction, involving taxes claimed to have been assessed upon the property of the plaintiff in error, in West Virginia, for the years 1880, 1881, 1882 and 1883, and that the aggregate amount of taxes thus assessed for those years, is correctly stated in the motion aforesaid; but nothing in the record of any of these suits makes the injunctions therein dependent on the decision of the cause pending in this Court; and no application to dissolve such injunctions has ever been made.

It is, however, a fact, that of the taxes involved in such suits, as of the taxes involved in this cause, not more than about one-sixth of each year's assessment belongs in any event to the State of West Virginia, the balance all going to numerous counties and municipal subdivisions of the State, who are not suffering from any financial embarrassment whatever; and of this-one-sixth, not over two-thirds is applicable to the large deficit already referred to. In other words, of the $149,276 37, representing all the taxes involed in all the litigation not over $30,000, belongs in any event to the State of West Virginia, and of this only two-thirds is applicable to the large deficit aforesaid. It should be remarked that of all taxes belonging to the State of West Virginia, one-third belongs to the State school fund, a fund in which there is no deficiency, but which in fact has supplied the general fund belonging to the State, in which the deficiency exists, with the means to provide temporarily for the aforesaid deficiency.

FOURTH. It is true, that on March 6, 1882, the attorney for the plaintiff in error united in a prayer of a petition of the attorneys for defendant in error, addressed to the Honorable Supreme Court of Appeals of West Virginia, asking that an early day of the then special term of the Supreme Court of Appeals of West Virginia should be fixed for the hearing of the above entitled cause, then pending in said Supreme Court of Appeals, but the plaintiff in error protests against the use of that fact, which is attempted to be made in the motion aforesaid. The fact is, that the case aforesaid was on the docket for argument at the January term preceding the said March 6, 1882, and the argument therein had already begun and had made certain progress at that term, when, on account of sickness, one of the Judges presiding was compelled to leave the Court. It was then suggested that the argument might proceed

before the remaining Judges or that the further argument might be postponed until the March special term in Wheeling, when the argument could proceed before the full Court; the last alternative was more agreeable to all parties concerned, and, accordingly, Court and counsel consented to a postponement of the argument until the March term at Wheeling.

On the day agreed upon for the argument at Wheeling all parties were present in Wheeling, in accordance with the arrangement made in January, to proceed with the argument; the counsel for the plaintiff having traveled several hundred miles for that purpose; and then, at the suggestion of the court, and in order to avoid a precedent to justify other hearings at special terms, and for the protection of the court solely, the petition referred to was then and there prepared and the attorney for the plaintiff in error united in the prayer thereof. In view of these circumstances no importance whatever should be attached to the petition aforesaid or the action of the attorney for the plaintiff in error in connection therewith.

And having answered, the Chesapeake & Ohio Railway Company, who has caused this answer to be signed with its name and sealed with its corporate seal, prays that the aforesaid motion be denied.

{ SEAL. } CHESAPEAKE & OHIO RAILWAY CO.
By WM. H. HOGEMAN.

WEST VIRGINIA, Kanawha County, to-wit:

William H. Hogeman, being duly sworn, says that he is one of the Attorneys and Counsel of the Chesapeake & Ohio Railway Company, and as such familiar with the matters stated in the foregoing Answer; that the matters therein stated are true, as he verily believes.

WM. H. HOGEMAN.

Subscribed and sworn to before me this 26th day of January, 1884.

W. S. LAIDLEY,
Notary Public, Kanawha Co., W. Va.

114-176

RECEIVED
FEB 21 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM 1884.

No. 203.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOSEPH S. MILLER, Auditor of the State of West Virginia,
Defendant in Error.

BAR ASSOCIATION

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

Reply to the Point in the Brief of Defendant in Error, on Pages 36–40.

WILLIAM J. ROBERTSON and
GEO. F. EDMUNDS,
Of Counsel.

THOMAS McGILL & CO., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term 1884.—No. 203.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH S. MILLER, AUDITOR OF THE STATE OF WEST VIRGINIA, DEFENDANT IN ERROR.

In Error to the Supreme Court of Appeals of the State of West Virginia.

REPLY TO THE POINT IN THE BRIEF OF DEFENDANT IN ERROR ON PAGES 36–40.

That the law of West Virginia in force when the present Chesapeake and Ohio Company began its existence provided that the Legislature might alter, amend, or repeal any charter.

I.

This point was neither made nor decided in the court below, and cannot be now first made in this court. It does not present a question within the jurisdiction of this court *unless* the State court decided it against the company; for if the question had been presented to the Court of Ap-

peals of West Virginia, and it had decided that section 8 of chapter 53 of the Code of that State did not operate to authorize the taxing legislation of 1877, the decision could not have been reviewed here.

II.

But if the question were open, it is submitted that the point is not well taken.

A. The law touching corporations in force in 1868, when the first of the foreclosed mortgages was executed by the Chesapeake and Ohio Railroad Company (Record, pp. 77–79, and page 90), was the Code of Virginia, which the West Virginia Constitution of 1863 adopted.

See section 8 of article IX, providing that "such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature." (Charters and Constitutions, part 2, p. 1991.)

B. The Code of Virginia so in force provided (chapter 61, sections 28, 29, and 31; Appendix, pp. 48, 49) that the purchaser of the property like that in this case shall at the instant of the purchase, and by the very act of purchase, be "forthwith a corporation," &c., and "shall succeed to all such franchises, rights, and privileges, and perform all such duties," &c., excepting as to debts and credits, as appertain to the company.

C. When, on the 1st of April, 1869, West Virginia adopted a code *in extenso* in place of the Virginia Code so in force down to that time, it was expressly provided that—

"1. All the provisions of the preceding chapters shall be in force upon and after the first day of April, eighteen

hundred and sixty-nine; and all acts and parts of acts of a general nature in force on the day preceding that day shall stand repealed, subject to such limitations as may be prescribed by law.

"2. Such repeal, except where it is otherwise provided in this act, shall not affect any act done or forfeiture incurred, or any right established, accrued, or accruing before the said first day of April, eighteen hundred and sixty-nine, or suit or proceedings pending on that day, save only that the proceedings thereafter had shall conform, as far as practicable, to the provisions of the foregoing chapter of this act." (Code of West Virginia, chapter 166.)

D. This repeal saved every "right established, accrued, or accruing before said 1st day of April, 1869."

E. Among these rights was the express and valuable one that the purchaser at the mortgage sale of internal improvement property should be—*he could not avert it if he would—a corporation, with all the rights, privileges,* &c., &c., of the old one.

F. The Code of West Virginia made no provision in its corporation chapter for foreclosure sales under mortgages or deeds of trust executed by internal improvement companies, or declaring the consequences of such sales; and so it saved these rights in its repealing chapter to those who had, on the invitation of the State, invested their money in the great work of internal improvement under the adopted Virginia Code, and acquired rights absolutely essential in these respects to the existence of their investments.

G. In this same code which saved these rights were the provisions respecting joint stock companies (chap. 53), section 8 of which, relied on by the counsel for the defendant in error, but part of which only is copied in his brief, is as follows:

"8. Where the Legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this act shall be construed to surrender or impair such right. And the right is hereby reserved to the Legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company. But in no case shall such alteration or repeal affect the right of the creditors of the company to have its assets applied to the discharge of its liabilities, or of its stockholders to have the surplus, if any, which may remain, after discharging its liabilities and the expenses of winding up its affairs, distributed among themselves in proportion to their respective interests."

The Constitution of West Virginia, by section 5 of article XI (Charters and Constitutions, part 2, p. 1990), had authorized the creating of special charters for banks and works of internal improvements only. It seems plain, then, that these provisions of the code respecting rights to alter, amend, or repeal referred alone to special charters as such which create really new companies for new enterprises, and did not apply, and were not intended to apply at all, to mere succession in the same general public work which had been expressly authorized by the Legislature, and put in the form of solemn contracts, in respect of the same general public work to which both the laws and the honor of the State had pledged these benefits in consideration of vast benefits received. The very language of section 8 supports this view. It speaks of a "charter or certificate of incorporation hereafter granted" by the Legislature. And in no sense of substance or truth has the Legislature of West Virginia granted any charter or certificate of incorporation to the plaintiff in error since that time It had provided before for a general succession, under circumstances named, of one set of persons to another, and nothing more.

H. And it then provided that no such alteration or repeal should affect the rights of creditors to have all corporate assets applied to the discharge of its liabilities, &c. Here one class of assets of the company, expressly recognized and authorized by the contract of the State to be mortgaged, was the privilege attached to the holders of the property, in whatever succession they might follow, to be free from the imposition of taxes until the company should have earned some money. This privilege was made expressly by law and by contract a part of the valuable assets, which it might mortgage to secure the payment of money to be raised for the building of this work for the benefit of the State.

I. It is contended, then, that no *charter* has been granted to the plaintiff in error, in the sense of this chapter 53, since the Code of West Virginia went into effect.

J. Again, the confirming act of the Legislature of West Virginia of 26th January, 1870, (Appendix, p. 42,) expressly confirmed the contract of the State Commissioners with the Chesapeake and Ohio Company by which money was to be raised by these mortgages; and the company was expressly endowed with all the benefits, privileges, &c., which appertained to a former company that had been unable to go on with the work, and which included the modified relief from taxation; and was expressly authorized by this contract and confirmation to make use of that privilege as one security that it might pledge to people who might advance money to construct the road. It is impossible to imagine that all these solemn proceedings in this great effort of the State to build this work were had with the implied understanding that the whole matter was entirely the subject of the passion or prejudice of successive Legislatures, and that the gentlemen who engaged in the enterprise on the faith of this contract and confirmation

were bound to know that they were getting no security or privilege whatever, and that the future of their property depended entirely upon the changing whims of succeeding Legislatures. Neither did this act of confirmation create a new charter, in the sense of chapter 53. But if it did, it expressly ratified *the contract as a contract*, so that it took the matter out of section 8 of chapter 53 of the Code of 1869 entirely.

K. The acts of West Virginia of 1871 and 1877 (Appendix, pp. 49, 50, and 51) re-enacted the substance and, with trifling exceptions, the very form of the old Code of Virginia already referred to, as to the succession under mortgage foreclosures of internal improvement property, and evidently intended to make it a pure *succession for the original purposes, and with the original rights and privileges*, and not to create a new undertaking with new rights and new responsibilities. In other words, it did not intend to subject the same undertaking and operations to any new legislative control, by reason of the execution of the very steps that had before been provided, and of the realization of the very rights and privileges that the Legislature had itself expressly contracted should belong to the mortgage creditor.

It is no wonder, then, that neither counsel nor court, in all the hearings below, ever alluded to the provisions of this well-known chapter (53) as to joint stock companies as having the slightest effect upon these transactions.

WILLIAM J. ROBERTSON and
GEO. F. EDMUNDS,
Of Counsel.

114-190

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1180.

THE CITY OF LITCHFIELD, APPELLANT.

vs.

GEORGE WILLIAM BALLOU, THE PORTSMOUTH SAVINGS BANK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 27, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

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1 *Placita.*

Pleas in the circuit court of the United States of America, within and for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon. Thomas Drummond, judge of the seventh judical circuit of the United States, *pro tempore* sole judge of said court, on Wednesday, the 30th day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and ninth year.

J. A. JONES, *Clerk.*

GEORGE WILLIAM BALLOU, PORTSMOUTH SAVINGS Bank, Thomas B. Thayer, Peter Upton, James H. Thatcher, William F. Hallett; Azel Ames and Joel Ames, partners as A. & J. Ames; Lake Village Savings Bank, William R. Porter, Charles Jordan, Marcus Ames, Robert J. Adams, James P. Weston, Rollingsford Savings Bank, Penacook Savings Bank, Samuel F. Brown, George C. Pierce; Albert H. Nicholay and Albert H. Nicholay, Jr., partners under the firm name and style of A. H. Nicholay & Co., *vs.* CITY OF LITCHFIELD.	No. 6099. In Chancery. Original Bill.
2 HOLLY MANUFACTURING COMPANY *vs.* CITY OF LITCHFIELD.	Cross-Bill.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

George William Ballou, a resident and citizen of the State of New York; the Portsmouth Savings Bank, a corporation existing under the laws of the State of New Hampshire and citizen of said State; Thomas B. Thayer, a citizen of the State of Massachusetts; Peter Upton and Joseph H. Thatcher, citizens and residents of the State of New Hampshire; William F. Hallett, a citizen and resident of State of Maine; Azel Ames and Joel Ames, partners as A. and J. Ames, citizens and residents of the State of Massachusetts; the Lake Village Savings Bank, a corporation existing under the laws of and a citizen of the State of New Hampshire; William R. Porter, a citizen and resident of the State of New Hampshire; Charles Jordan, Robert J. Adams, and James P. Weston, citizens and residents of the State of Massachusetts; Rollingsford Savings Bank and the Penacook Savings Bank, both corporations existing under the laws of the State of New Hampshire and citizens of said last-named State; Marcus Ames and George C. Pierce, citizens and residents of the State of Massachusetts; Samuel F. Brown, a citizen and resident of the State of New Hampshire, and Albert H. Nicholay and Albert H. Nicholay, Jr., partners as A. H. Nicholay & Co., citizens and residents of the State of New York, the complainants, by Messrs. M.

Hay and D. T. Littler, their solicitors, bring their bill
3 against the City of Litchfield, a municipal corporation organized and existing under the laws of the State of Illinois, and located in said district, the defendant; also, the Holly Manufacturing Company, a corporation organized and existing under the laws of the State of New York and a citizen of said last-named State, by Messrs. M. Hay and D. T. Littler, its solicitors, brings its cross-bill against the said City of Litchfield, said defendant, which puts in its place Messrs. Stuart, Edwards and Brown and Robinson and Shutt, its solicitors, at the suit of complainants in the bills aforesaid.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 15th day of March, in the year of our Lord one thousand eight hundred and eighty-one, came George William Ballou, complainant, by his solicitors, and filed in the office of the clerk of said court his bond for costs, bill of complaint, and exhibit to bill, which said bond, bill, and exhibit are in the words and figures following, to wit:

Bond for Costs.

CIRCUIT COURT, UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

June Term, A. D. 1881.

4 GEORGE W. BALLOU *vs.* THE CITY OF LITCHFIELD. } In Chancery.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this fifteenth day of March, 1881.

D. T. LITTLER.
M. HAY.

(Endorsed:) Filed March 15, A. D. 1881. J. A. Jones, clerk.

Bill.

In the Circuit Court of the United States for the Southern District of Illinois. June Term, A. D. 1881.

To the honorable the judges of said court, in chancery sitting:

5 George W. Ballou, a resident and citizen of the State of New York, by Milton Hay and D. T. Littler, his solicitors, brings this bill on behalf of himself and all other holders of certain bonds hereinafter mentioned, who may hereafter join in this suit and contribute to the expense thereof, against "The City of Litchfield," a municipal corporation duly organized and existing under and by virtue

of the laws of the State of Illinois, a resident and citizen of said State and of the district aforesaid. And thereupon your orator complains and shows unto your honors that said city of Litchfield, by an act of the Legislature of the State of Illinois, in force February 16th, 1859, was duly created a municipal corporation, with all the powers incident to that class of corporations, and for the purpose of exhibiting to your honors the powers and rights as well as the duties imposed on said city by the said act of incorporation, reference thereto is hereby made, and the said act is prayed to be taken and considered as part of this bill, and which said act will be found commencing on page 181 and extending to and embracing page 213 of the Private Laws of Illinois of 1859. That in pursuance of the act aforesaid, the said city became duly organized as such long prior to the date of the bonds hereinafter described, and from thence hitherto has been and is now exercising the powers, rights, and franchises conferred upon it by virtue of its said charter.

Orator further shows that afterwards, to wit, on the 15th
6 day of April, A. D. 1873, the Legislature of the State of Illinois passed a public act, general in its character (which was duly approved and became a law on the day and year last aforesaid), entitled "An act authorizing cities, incorporated towns, and villages to construct and maintain water works," which act is still in full force and effect. That in pursuance of the terms of the act last mentioned the city council of the said city of Litchfield, on, to wit, the 4th day of December, A. D. 1873, adopted an ordinance in due form, which is in the words and figures following, to wit:

Ordinance No. 184.

An ordinance to provide for the issuing of bonds for the construction of the Litchfield water works.

Be it ordained by the city council of the city of Litchfield—

SEC. 1. That in accordance with the power conferred by section second of an act of the General Assembly of the State of Illinois entitled an act authorizing cities, incorporated towns, and villages to construct and maintain water works, approved April 15th, 1873, the mayor and city clerk are hereby authorized and instructed to issue not exceeding fifty thousand dollars in Litchfield water bonds, which bonds shall be used for borrowing money for the erection, constructing, and maintaining of water works for the use of the people of said city of Litchfield.

SEC. 2. That the said Litchfield water bonds shall be of the de-
nomination of five hundred dollars each, shall be dated Jan-
7 uary 1st, 1874, and shall become due twenty years after said date, but may be redeemed at par at any time after the year 1878, notice being given at the Nassau Bank, in the city of New York, six months in advance of the intention so to redeem and said bonds shall bear interest at the rate of ten per centum per annum, payable semi-annually, at the said Nassau Bank, in the city of New York.

Orator further shows that in pursuance of the law and the ordi-

nance aforesaid the said city, by its then mayor and city clerk, and under the corporate seal of said city, duly issued one hundred of its bonds of the denomination of $500.00 each, serially numbered from one to one hundred, both numbers inclusive, which said bonds are copies of each other, except as to the serial numbers, and bond No. — is in the words and figures following, to wit:

No. —. LITCHFIELD WATER BOND. 500.00.

City of Litchfield, State of Ills.

The city of Litchfield, in the State of Illinois, for value received, promised to pay to Geo. Wm. Ballou, or bearer, five hundred dollars, in current money of the United States, at the Nassau Bank, in the city of New York, twenty years after date, with *in* interest thereon from the date hereof at the rate of ten per centum per annum, which interest shall be payable semi-annually in current money of
8 the United States, on presentation at said bank of the coupons hereto annexed: Provided, That the said city of Litchfield shall have the right to pay off and redeem this bond at its par value at any time after the year A. D. 1878, first giving said bank six months' notice in writing of the intention to so redeem.

This bond is issued under authority of an act of the General Assembly of the State of Illinois, entitled "An act authorizing cities, incorporated towns, and villages to construct and maintain water works," approved Apr. 15th, 1873, and in pursuance of the ordinance of the said city of Litchfield, numbered 184, and entitled "An ordinance to provide for the issuing of bonds for the construction of the Litchfield water works," approved December 4, 1873.

In testimony whereof, the mayor of said city has hereunto set his hand, and caused the corporate seal to be affixed and the clerk of said city to countersign the same, this first day of January, A. D. 1874.

W. S. PALMER, *Mayor.*

B. S. HOOD, *City Clerk.*

Which said bonds, and each of them, the said city, by its authorities aforesaid, claimed and asserted to be binding and valid obligations thereof, and as such recommended their purchase to orator and others.

9 Orator further shows that upon the representations of said city authorities, and relying upon the law and the ordinance aforesaid, and fully believing that said city had the right to issue said bonds, he afterwards, to wit, in the years of A. D. 1874 and 1875, became the purchaser of a large number of said bonds, to wit, the following number:

Of whom bought.	Date.	Am't.	Numbers.	Price.	Accrued interest.	Total.
W. S. Palmer, Mayor.	April 30, 1874.	13,000	1–26 inc.	92½	429 73	12,454 73
	May 5, 1874.	4,500	27–35 "	92½	154 98	4,317 48
	" 15, "	3,000	36–41 "	92½	111 67	2,886 67
	" 22, "	500	42	92½	18 33	480 83
	" 25, "	9,000	43–60 "	92½	360 00	8,685 00
S. M. Grubbs, Mayor.	July 21, 1874.	4,000	91–98 "	95	22 22	3,822 22
	Aug. 5, "	5,000	61–70 "	95	48 61	4,798 61
	11, "	1,000	99–100 "	95	11 38	961 39
	25, "	1,000	71–72 "	95	15 00	965 00
	Oct. 27, "	1,000	73–74 "	95	32 22	982 22
S. M. Grubbs. Mayor, —and delivered by Holly Manufact'g Company, ac. city of Litchfield.	Jan'y 13, 1875.	500	90	95	1 67	476 67
	" 16, "	2,500	85–89 "	95	10 42	2,385 42
	Feb'y 3, "	500	75	95	4 44	479 44
	" 4, "	1,500	76–78 "	95	13 75	1,438 75
	" 6, "	1,500	79–81 "	95	14 58	1,439 58
	" 19, "	1,500	82–84 "	95	15 83	1,440 83
						$48,014 84

For which he paid in the aggregate the sum of $48,014.84, and
10 which said bonds he is still the owner and holder of, and that the balance of said bonds were sold, as orator is informed and believes, but he does not know the present owners nor the amount of money the city received therefor.

Orator further shows that notwithstanding the issue and delivery of the bonds as aforesaid, and the payment of the money by orator therefor as aforesaid, the said city hath hitherto wholly failed and refused to pay interest or principal thereof; on the contrary, the said city has repudiated the said bonds and divers all legal obligations to pay either interest or principal.

Orator further shows that on, to wit, the 27th day of November, A. D. 1876, one Alexander Buchanan brought suit in this court in an action of assumpsit against the said City of Litchfield, on divers interest coupons taken from a portion of the said issue of bonds, to which suit the said City of Litchfield interposed as a defense its want of power under the laws and constitution of the State of Illinois, to issue the said bonds or any of them, and orator further shows the issues in said suit were found for the defendant, and the said bonds and coupons by the finding and judgment of this court were held null and void for want of power in said city to issue the same.

Orator further shows that said case was taken by writ of error
to the Supreme Court of the United States, and is number
11 51 on the docket of that court for the present term.

Orator further shows that after full argument thereof by counsel the said Supreme Court at its present term affirmed the judgment of this court, and so your orator avers that the invalidity of said entire issue of bonds has been established by the court of last resort. And your oratar here offers to bring into court the said bonds by him held as aforesaid, and surrender the same to said city, under the direction of this court.

For the purpose of fully informing your honors as to the facts and issues involved in the said case orator files herewith a complete copy of the printed record thereof, which is marked Exhibit "A," and is prayed to be taken and considered as part of this bill, and orator will produce a copy of the opinion of said Supreme Court in said cause, affirming the judgment aforesaid on the final hearing hereof.

Orator further shows that all the money paid by him for said bonds as aforesaid, amounting in the aggregate to the sum of $48,014.84, was received by the said City of Litchfield, and the said city still retains the same and denys all liability either to pay said bonds or refund to orator the money so paid as aforesaid.

12 Orator further shows that with the money arising from the sale of the bonds as aforesaid the said city, by its proper authorities, proceeded to construct a system of water works, which said works are now completed and in full operation, and the benefits arising therefrom are now and have been since the completion thereof enjoyed by the said city and its inhabitants.

Orator further shows that said water works, consisting chiefly of buildings and the machinery necessary to supply the said city with water, are located on the following described premises, to wit: Commencing at N. E. corner of the northwest ¼ N. W. ¼ 9, 8, 5, running thence west 25 rods and 20 links to a stone as a point of beginning; thence west on the line between sections 4 and 9, 478 feet to the east line of the Toledo, Wabash & Western railroad right of way; south on east line of said railroad right of way 172 feet to the north line of the Hillsboro' & Gillespie county road; east on north line of right of way of said county road 512 feet to a stone set in the center of said county road; north 292 feet to a stone at said beginning point; also, beginning at the same stone and running thence N. 57° W. 327 feet to a stone on the west side of the branch; north 83° W. 167 feet to a stone E. line of above R. R. right of way; S. on said R. R. right of way 175 feet to the sect. line; E. on sect. line 478 feet to

13 place of beginning, being part of sections 4 and 9, 8, 5, and containing 4 acres and about one-seventh of an acre. For a greater certainty as to said described premises reference is made to a deed of warranty of same, of date December 28, 1875, by which Robert Smith and wife conveyed the same to the City of Litchfield. Also, commencing at the northwest corner of southeast one-quarter of N. W. ¼, 9, 8, 5, and running thence south on the west line of said S. E. ¼ N. W. ¼ 32 rods, E. 10 rods; north parallel with west line of said tract 32 rods to the north line of said tract; thence running west on said north line 10 rods to place of beginning, two acres, more or less. For greater certainty as to the description of said land reference is made to warranty deed of date ———, by which Prentiss D. Cheney and wife conveyed said premises to the City of Litchfield. Also, commencing at a point 10 rods east of the S. W. corner of S. E. ¼ N. W. ¼, 9, 8, 5, east on south line of said tract 30 rods; north parallel with the west line of said tract to the north line of said tract; west on said north line to a point 10 rods east of northwest corner of said quarter; south parallel with west line of said quarter *quarter* to the south

line to the place of beginning, containing 15 acres, more or less; and for greater certainty as to the above-described lands reference is made to a certain warranty deed of date January 9, 1873, by which Wm. C. Davis and wife conveyed said premises to the City of Litchfield. Also, a part of west ½ northwest ¼, 9, 8, 5, Montgomery
14 county, Illinois, beginning at the S. E. corner of northwest ¼ of section 9, running thence north with compass adjusted 5° west 275 feet to a stone set in ground, north 47° west 325 feet to a stone, W. 150 feet to a stone, north 9° 30′ west 520 feet to a stone, northwesterly along south line of the Hillsboro & Gillespie public road 320 feet to a stone, south 37° east 219 feet to a stake, S. 2° E. 600 feet to a stone, south 71° east 425 feet to a stone, south to a stone 250 feet south of last-mentioned stone, south 44° 30′ west 250 feet to a stone, south 23° west 392 feet to a stone, south 69 degrees west 734 feet to a stone, south 41 degrees 30 minutes west 213 feet to a stone, south 240 feet to a stone set in the ground as the quarter section corner between sections 9 and 8; east on Val. Hoffman's south line 217 feet to a stone, north 67 degrees east 659 feet to a stone, north 44 degrees east 750 feet to a stone on the division line between the east ½ and the west ½ of northwest ¼, 9, 8, 5, north on said division line 528 feet to a stone set in the ground at the place of beginning, containing 25 acres and 13,650 square feet more or less. Also for greater certainty as to the description of said land reference is made to a certain warranty deed by which Valentine Hoffman and wife, March 24, 1873, conveyed said described premises to the City of Litchfield; also commencing at the S. W. corner of the southeast one-quarter northwest one-quarter 9, 8, 5, Montgomery county, Illinois; thence run-
15 ning east on south line of said tract 600 feet to a stone set in ground, north 150 feet to a stone, west parallel with the south line of said tract 164 feet to a stone, north 705 feet to a stone set on the south line of the county road as it is now traveled, west on said south line of road 30 feet to a stone, south 705 feet to stone, west two hundred and eighty feet to stone, north 125 feet to stone, west 125 feet to stone, south 275 feet to the place of beginning, containing 2 acres and 17,875 square feet of land, more or less. Said strip of land, 705 feet long by 30 feet wide, running north and south as described above, is to be and remain a public cartway forever. For greater certainty as to the description of said premises reference is made to a certain warranty deed of date March 25, 1873, by which Jacob Beeler and wife conveyed the same to the City of Litchfield. All of aforesaid tracts or parcels of land being located in township 8 north, range 5 west, county of Montgomery and State of Illinois, the title to which said real estate is in the City of Litchfield, and remainder of said works consist of the water pipes, hydrants, and other appurtenances connected therewith distributed throughout the said city; all of which said water works, real estate, machinery, water pipes, hydrants, and all appurtenances thereunto belonging, as well as the cost of the labor expended in the erection and completion thereof, orator avers was paid for by said city with the money
16 arising from the sale of the bonds aforesaid, and all of which is of great value to the said city and its inhabitants.

The premises considered, orator prays your honors to take cognizance of this bill, and grant that process in chancery may issue out of this court, under the seal thereof, against the said City of Litchfield, directed, &c., commanding, &c., returnable, &c., and grant that the said defendant under the rules of this court may be required to answer all and singular the allegations, matters, and things herein contained fully and specifically, not under oath, however, the oath of defendant being waived, and inasmuch as the money arising from the sale of said bonds was furnished by orator and others and expended by the said city in the construction of said water works, &c., orator prays that a receiver may be appointed by this court to take charge of said property during the pending of this suit, and until the further order of the court, and that such receiver, under the direction of this court, collect all water taxes, water rents, or water rates now due or hereafter to become due to the said city from the inhabitants thereof, under any contract or ordinance in existence between the said city and said inhabitants, and that said receiver also have power to continue such arrangements for the supplying of water to said city and its inhabitants, or make other satisfactory and advantageous ar-
17 rangements therefor during the pendency of this suit, and that he have power to use, manage, and control said water works as aforesaid, without molestation or hindrance from the said city, its authorities, or other person or persons, and that he report and hold all money coming into his hands as such receiver subject to the further order of this court. And grant that an account may be taken of the amount of money paid by orator and others in whose behalf he sues from time to time as hereinbefore stated, with six per cent interest thereon from the several dates of payment. And further grant to decree a specific lien upon said water works hereinbefore particularly described in favor of the several persons whose money was used in the construction thereof as herein stated.

And further grant upon the final hearing hereof to render a decree in favor of orator, as hereinbefore mentioned, against the said City of Litchfield for the whole amount of money paid by him and them to said city for said bonds, together with six per cent. per annum interest thereon from the several dates of payment as aforesaid. And further grant to order and decree the payment of said sum so to be found due, &c., within a short time, to be fixed by the court, or in default thereof that said water works, with all and singular the appurtenances thereto belonging, be sold in sat-
18 isfaction of said decree, and in case the said water works, &c., shall not sell for the full amount of said decree, further grant to order and decree the payment of any balance due thereon (after applying any money which may come into the hands of said receiver, &c.) out of any money in the treasury of said city not appropriated, and in case there are no funds, or insufficient funds in said treasury for said purpose, that then the corporate authorities of said city be required to levy, extend, and collect a tax on the taxable property within the corporate limits thereof for said purpose, and that when said tax is collected said authorities be re-

quired to pay the money into court to be applied in satisfaction of said decree, and further grant that the money arising from the sale of said water works may be distributed among the holders of said bonds in proportion to the amounts paid by them to said city.

And grant unto orator such other, further, and general relief as the nature and equities of his case may require, and as shall seem meet and equitable to your honors, and as in duty bound orator will ever pray, &c.

GEO. WM. BALLOU,
By MILTON HAY AND
D. T. LITTLER,
His Solicitors.

Endorsed: Filed March 15, 1881. J. A. Jones, clerk.

19 EXHIBIT "A" TO BILL.

Transcript of Record.

Supreme Court of the United States.

ALEXANDER BUCHANAN, Plaintiff in Error,
vs.
THE CITY OF LITCHFIELD, ILLINOIS.

In error to the circuit court of the United States for the southern district of Illinois.

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, judge of the seventh judicial circuit, presiding judge of said court, and the Hon. Samuel H. Treat, district judge of said district, associate judge of said court, on Wednesday, the 7th day of March, at the January term of said court, in the year of our Lord eighteen hundred and seventy-seven, and of our Independence the one hundred and first year.

J. A. JONES, *Clerk.*

ALEXANDER BUCHANAN
vs.
CITY OF LITCHFIELD. } In Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Alexander Buchanan, a citizen of the State of Massachusetts, puts in his place Messrs. John M. and John Mayo Palmer, his
20 attorneys, against the city of Litchfield, a municipal corporation organized under the laws of the State of Illinois, and a resident of said southern district of Illinois, defendant, which puts in its place Messrs. Hay, Greene and Littler, its attorneys, in a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 25 day of November, in the year of our Lord eighteen hundred and seventy-six, came

said plaintiff, by his said attorneys, and filed in the office of the clerk of said court his bond for costs and declaration in said entitled cause, which said bond for costs and declaration are in the words and figures following, to wit.

Bond for Costs.

CIRCUIT COURT, UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

January Term, A. D. 1877.

ALEXANDER BUCHANAN }
vs. } In Assumpsit.
THE CITY OF LITCHFIELD. }

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this twenty-seventh day of November, 1876.

JNO. M. AND JNO. MAYO PALMER.

21 (Endorsed:) Filed November 28th, A. D. 1876. J. A. Jones, clerk.

Declaration.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In the United States Circuit [Court] for said District. Of January Term, A. D. 1877.

Alexander Buchanan, who is a citizen of the State of Massachusetts, complains of the City of Litchfield, a municipal corporation, organized under the laws of the State of Illinois, a citizen of the State of Illinois, in an action of assumpsit, for that whereas the said defendant heretofore, to wit, on the first day of January, A. D. 1874, at, to wit, the district aforesaid, made its certain one hundred instruments in writing, commonly called coupons or interest notes, wherein and whereby the said defendants, in and by each of the said coupons or interest notes, promised to pay to the bearer thereof, at the Nassau Bank, in the city of New York, the sum of twenty-five dollars on the 1st day of July, A. D. 1876, and then and there delivered the same to one George William Ballou, and the said George William Ballou after the making by the said defendant of the said interest notes or coupons, and before the maturity thereof, on, to wit, the day and year aforesaid, at ——, &c., aforesaid, duly assigned and delivered the said one hundred coupons or interest notes, and each of them to the plaintiff, who thereby then and there became and was and still is the lawful bearer thereof and

22 entitled to demand and receive the payment of the said several sums of money in each of the said coupons or interest notes specified, whereof the defendant, on ——, &c., at ——, &c., had

notice, and by reason of which promises the said defendant became liable to pay to the plaintiff the several sums of money in each of the said coupons or interest notes specified, according to the tenor and effect of the said notes or coupons, and being so liable the said defendant on ——, &c., at ——, &c., aforesaid, promised the plaintiff to pay him the said sums of money in the said coupons specified, according to their tenor and effect.

And whereas also the said defendant, on the day and year aforesaid, at ——, &c., aforesaid, was indebted to the plaintiff in the sum of two thousand dollars for so much money by the said plaintiff before that time lent and advanced to the said defendant by the said plaintiff at the request of the defendant. And also in another like sum of money for so much other money by the said defendant had and received to and for the use of the plaintiff. And also in another like sum of money for lawful interest before that time due, owing, and payable by the said defendant to the said plaintiff upon certain sums of money by the said plaintiff before that time lent and advanced to and for the said defendant at its request, and upon other sums of money before that time had and received by the said defendant to the use of the plaintiff.

23 And being so indebted the said defendant, in consideration thereof, on the day and year aforesaid, at ——, &c., aforesaid, promised the said plaintiff to pay him the sum of money in this count mentioned when thereunto requested. Yet the said defendant, though often requested, hath not paid the plaintiff the aforesaid several sums of money or either of them, but neglect- and refuses so to do, to the damage of the plaintiff of five thousand dollars; and therefore he sues, &c.

JOHN M. AND JONO. MAYO PALMER,
Att'ys for Pl'ff.

Copy of Instrument sued on.

25 Litchfield Water Bonds. 25

The City of Litchfield, Illinois, will pay to bearer, at the Nassau Bank, in the city of New York, twenty-five dollars, being six months' interest on bond No. 1, due July 1st, 1876.

W. S. PALMER, *Mayor.*

B. S. HOOD, *City Clerk.*
(On the face:) 5.

One hundred of the coupons aforesaid will be introduced in evidence of like tenor of the foregoing, numbered from one to one hundred, both inclusive, differing only in the number.

The City of Litchfield to Alexander Buchanan, Dr.:

To money lent and advanced		$5,000
To money had and received		5,000
24 To interest upon money loaned		$500

(Endorsed:) Filed November 28, 1876. J. A. Jones, clerk.

And afterwards, to wit, on the said 28th day of November, in the year aforesaid, there was issued out of the —— clerk of said court a summons in said cause, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you to summon the City of Litchfield, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto Alexander Buchanan of a plea of trepass on the case upon promises to his damage, as he alleges, of five thousand dollars; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the one hundred and first year.

[L. S.] J. A. JONES, *Clerk.*

I hereby appoint I. R. Blockwell my special deputy to execute this writ.

December 14th, '76.

E. R. ROE, *U. S. Mar.*

Executed this writ on 15th day of December, 1876, by delivering a true copy thereof to David Davis, mayor of the city of Litchfield.

E. R. ROE, *U. S. Mar.*,
By I. R. BLOCKWELL,
Special Deputy.

(Endorsed:) Filed December 29, A. D. 1876. J. A. Jones, clerk.

And afterwards, to wit, on Monday, the 8th day of January, at the January term of said court, in the year of our Lord eighteen hundred and seventy-seven, the following proceedings were had in said court in said cause and entered of record, to wit:

Rule to Plead.

ALEXANDER BUCHANAN } Assumpsit.
vs.
CITY OF LITCHFIELD. }

On motion of plaintiff, by Messrs. John M. and John Mayo Palmer, his attorneys, the defendant, having been regularly served

with process, is ruled to plead herein by Monday, the 15th day of January, inst.

And afterwards, to wit, on the 12th day of January, in the year aforesaid, came said defendant, by its said attorneys, and filed in said clerk's office its plea in said cause, which said plea is in the words and figures following, to wit:

Plea.

In the Circuit Court of the United States for the Southern District of Illinois.

26 To the January Term, A. D. 1877.

THE CITY OF LITCHFIELD } Assumpsit.
ats.
ALEXANDER BUCHANAN. }

And the defendant, by McWilliams and Hay, Greene and Littler, its attorneys, comes and defends the wrong and injury when, &c., and says that it did not undertake and promise in manner and form as the plaintiff hath in his declaration complained against it, and of this the defendant puts itself upon the country.

ROBERT McWILLIAMS AND
HAY, GREENE, AND LITTLER,
Attorneys for Defendants.

(Endorsed:) Filed January 12th, 1877. J. A. Jones, clerk.

And afterwards, to wit, on the 24th day of February, at the January term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Cause Set for Hearing.

ALEXANDER BUCHANAN } Assumpsit.
vs.
CITY OF LITCHFIELD. }

By consent of parties, by their attorneys, this cause is set for hearing on the 1st day of March next.

And afterwards, to wit, on Wednesday, the 7th day of March, in the year last aforesaid, the following further proceedings
27 were had in said court in said entitled cause and entered of record, to wit:

Judgment.

ALEXANDER BUCHANAN } Assumpsit.
vs.
CITY OF LITCHFIELD. }

This day comes as well the plaintiff, by Mess. John M. and John Mayo Palmer, his attorneys, as the defendants, by Messrs. Hay,

Greene, and Littler, its attorneys, and the issue joined by consent is tried by the court, a jury being waived; and the court, having heard the evidence and argument of counsel, finds the issue for the defendant.

It is therefore ordered and adjudged that the defendant go hence without day and recover of the plaintiff the costs and charges by it about its defence in this behalf expended, amounting to the sum of —— dollars and —— cents, and that execution issue therefor.

And afterwards, to wit, on the 7th day of March, in the year aforesaid, there was filed in said clerk's office a certificate of division in said cause, which said certificate of division is in the words and figures as follows, to wit:

Certificate of Division.

In the Circuit Court of the United States, Southern District of Illinois. January Term, A. D. 1877.

Present: The Hon. Thomas Drummond, circuit judge; the Hon. Samuel H. Treat, district judge.

28 ALEXANDER BUCHANAN *vs.* THE CITY OF LITCHFIELD. } In Assumpsit.

On the trial of the above cause *the above cause* the above-named judges, without the intervention of a jury, by the consent of the parties, the plaintiff, to maintain the issues on his part, offered in evidence one hundred (100) coupons, of which it was admitted he was the *bona fide* holder for value, issued by the defendant, the City of Litchfield, under the following circumstances: On the 15th day of April, 1873, the Legislature of the State of Illinois passed an act entitled "An act authorizing cities, incorporated towns, and villages to construct and maintain water works," by the first section of which act it is provided that all cities, incorporated towns, and villages in this State be, and are hereby, authorized and shall have power to provide for a supply of water for the purpose of fire protection and for the use of the inhabitants of such cities, incorporated towns, and villages by the erection, construction, and maintaining of a system of water works. And by the second section of the same act it was provided that such cities, incorporated towns, and villages may borrow money and levy and collect a general tax, in the same manner as other municipal taxes may be levied and collected, for the erection, construction, and maintaining of such water works and appropriate money for the same. On the 4th day of December,
29 1873, the city council, the legislative authority of the city of Litchfield, adopted an ordinance in the words following:

Ordinance No. 184.

Be it ordained by the city council of the city of Litchfield—

SEC. 1. That in accordance with the power conferred by section second of an act of the General Assembly of the State of Illinois, en-

titled an act authorizing cities, incorporated towns, and villages to construct and maintain water works, approved April 15th, 1873, the mayor and city clerk are hereby authorized and instructed to issue, not exceeding fifty thousand dollars, in Litchfield water bonds, which bonds shall be used for borrowing money for the erection, constructing, and maintaining of water works for the use of the people of said city of Litchfield.

SEC. 2. That the said Litchfield water bonds shall be of the denomination of five hundred dollars each, shall be dated January 1st, 1874, and shall become due twenty years after said date, but may be redeemed at par at any time after the year 1878, notice being given at the Nassau Bank, in the city of New York, six months in advance of the intention so to redeem, and said bonds shall bear interest at the rate of ten per centum per annum, payable semi-annually, at the said Nassau Bank, in the city of New York.

Which ordinance was approved by the mayor of the city, as required by the charter.

30 After the adoption of the ordinance, the mayor and city clerk made one hundred bonds, of the denomination of $500 each, as authorized by the ordinance, which are as follows, differing in the numbering, from 1 to 100, inclusive:

No. —. LITCHFIELD WATER BONDS. 500.00.

City of Litchfield, State of Ills.

The City of Litchfield, in the State of Illinois, for value received, promised to pay to Geo. Wm. Ballou or bearer five hundred dollars in current money of the United States at the Nassau Bank, in the city of New York, twenty years after date, with *in* interest thereon from the date hereof at the rate of ten per centum per annum, which interest shall be payable semi-annually in current money of the United States on presentation at said bank of the coupons hereto annexed: Provided, That the said City of Litchfield shall have the right to pay off and redeem this bond at its par value at any time after the year A. D. 1878, first giving said bank six months' notice, in writing, of the intention so to redeem. This bond is issued under authority of an act of the General Assembly of the State of Illinois, entitled "An act authorizing cities, incorporated towns, and villages to construct and maintain water works," approved Apr. 15th, 1873, and in pursuance of an ordinance of the said City of Litchfield, numbered 184, and entitled "An ordinance to provide for the issuing of bonds for the construction of the Litchfield water works," approved December 4th 1873.

31 In testimony whereof, the mayor of said city has hereunto set his hand and caused the corporate seal to be affixed and the clerk of said city to countersign the same, this first day of January, A. D. 1874.

W. S. PALMER, *Mayor.*

B. S. HOOD, *City Clerk.*

Coupons for the semi-annual interest were attached to the said

bonds, and the whole number, amounting to fifty thousand dollars, were sold by the city for the purposes for which they were authorized. The plaintiff's coupons, one hundred in number, for twenty-five dollars each, falling due July 1st, 1876, were for interest on said bonds. The defendants then proved against the objection of the plaintiff, who insisted that such evidence was not admissible against him as the *bona fide* holder of such coupons; that the City of Litchfield is incorporated under a special law which defines its boundaries; that there was no assessment made of the taxable property within said city for the year 1873 separately, but that the city is within the limits of two municipal townships, organized under the township organization laws of the State—one called North Litchfield and the other South Litchfield, each six miles square, and that the taxable property in the city was assessed for State and county taxes in the township in which it was located and to which it belonnged; that the property of the city, as assessed for State
32 and county taxes for the year 1873, was $1,400,000, which valuation was ascertained by the following method:

The assessors of North and South Litchfield returned to the clerk of the county court the lists and value of the property assessed for taxation for the year 1873 in said township, respectively, which lists contained a description of all the lands, lots, and other real estate in said township, with the proper valuation opposite each tract or lot. With these lists and the plat of the city before him the clerk was able to ascertain the description and value of all the real estate in the city, and by footing the value of the several lands and lots found within the city limits the aggregate value of all the real estate of the city was ascertained for the year 1873. By another special law the City of Litchfield is made one school district, called the Litchfield school district. And it is a part of the legal duty of the township to note opposite the name of each owner of personal property assessed for taxation the school district in which he resides. That the assessor of North and South Litchfield for the year 1873 noted opposite the names of the owners of personal property in their township residing within the city limits that they resided in Litchfield school district, and the assessed value of the personal property of the City of Litchfield was ascertained by computing the value of all the personal property assessed for taxation in the
33 school district. That railroad property and property of corporations was assessed by the State board of equalization, and the whole value of these species of property lying in Montgomery county (in which the City of Litchfield is situated) was certified by the auditor to the county clerk, and the proportions taxable in Litchfield was ascertained by the clerk. That the assessment thus made by the town assessor of the towns of North and South Litchfield was the only assessment made or authorized by law to be made of the property situated in the City of Litchfield for State and county taxes for the year 1873, and which assessment for the purposes aforesaid was the last assessment for State and county taxes previous to the issuing and making of said bonds. That by compiling the assessments thus made the exact amount of the value of

taxable property in said City of Litchfield for the year 1873, as assessed for State and county taxes, should be, and is ascertained to be, the said sum of $1,400,000. And it was proved that the debt of the City of Litchfield on and before the 1st day of January, 1874, exclusive of water bonds, was $70,000. And the defendant then insisted that the said bonds were in excess of five per centum upon the valuation of the taxable property in the said city as ascertained by the assessment of State and county taxes for the year 1873, and therefore void under the provisions of the 12th section of the
34 9th article of the constitution of the State of Illinois, which is in these words:

"SECTION 12. No county, city, town, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness."

Upon the trial aforesaid the following questions arose and occurred, to wit:

First. Whether the said 12th section of the 9th article of the constitution of the State of Illinois, by its own force and terms, without appropriate legislation, limited or affected the otherwise lawful power of the City of Litchfield to issue the bonds and coupons and sell the same to raise money for the construction of water works according to the provisions of the act of April 15th, 1873, and the ordinance of the City of Litchfield, No. 184, in relation thereto, so as to render said bonds and coupons void, as being in excess of five per centum, including existing indebtedness, on the value of taxable property in said city, as ascertained by the last assessment for State and county taxes preceding the issue of such bonds?

Second. Whether the facts offered in evidence for the purpose of showing the value of taxable property in the City of Litchfield for the year 1873 are competent and sufficient to establish the
35 value of taxable property therein, to be ascertained by the last assessment thereof, for State and county taxes previous to the issue of such bonds?

Third. Whether the said facts tending to prove that the said bonds, including the indebt-ness of said city, exceed five per centum on the value of the taxable property of said city at the time they were issued, as ascertained in manner before stated, are admissible or competent as evidence in this case, impair the rights of the plaintiff as the *bona fide* holder of the c-upons sued on?

And the opinion of the said judges being opposed upon the points and questions before stated, they hereby certify the facts so found and admitted on the trial, and the said several questions upon which their opinions were opposed, according to the statute in such case made and provided.

T. DRUMMOND.
S. H. TREAT.

(Endorsed:) Filed March 7th, 1877. J. A. Jones, clerk.

And afterwards, to wit, on the 14th day of April, in the year aforesaid, came said plaintiff, by his attorneys, and filed in said clerk's office his bond in said cause; which said *which said* bond is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Geo. M. Ballou,
36 of Boston, do hereby constitute and appoint John M. and John Mayo Palmer, of Springfield, Illinois, our true and lawful attornies, for us, and in our name and stead, to sign a bond of ($500.00) five hundred dollars, on an appeal of the case of Alexander Buchanan *vs.* The City of Litchfield, Illinois, hereby granting unto our said attornies full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at our discretion to constitute and appoint, from time to time, as occasion may require, one or more subagents or attorneys under same, and their authority at pleasure to revoke.

In witness whereof, we hereto set *set* hands and seal, this 9th day of April, in the year one thousand eight hundred and seventy-seven.

GEO. WM. BALLOU & CO. [L. S.]

Signed and sealed in presence of—
GEO. A. DOANE, JR.

Supreme Court of the United States.

ALEXANDER BUCHANAN
vs.
THE CITY OF LITCHFIELD. } In Assumpsit.

Know all men by these presents, that we, Geo. M. Ballou & Co., as principal, and John M. and John Mayo Palmer, as securities, are held and firmly bound unto The City of Litchfield in the sum of five hundred dollars; to the payment of which we bind ourselves, our
37 heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 14th day of April, A. D. 1877.

Now, the condition of this obligation is such that if the above-named Alexander Buchanan shall pay, or cause to be paid, all costs incurred in the Supreme Court of the United States in the further prosecution [of] the above-entitled suit upon the certificate of division as aforesaid, and the writ of error sued out to be filed and returnable in the said Supreme Court on or before the second Monday in October next, then this obligation to be void; otherwise to remain in full force and virtue.

GEO. WM. BALLOU, [SEAL.]
By JOHN M. AND JOHN MAYO PALMER,
Attorneys-in-Fact.
JOHN M. AND JOHN MAYO PALMER. [SEAL.]

(Endorsed:) Filed April 14th, 1877. J. A. Jones, clerk. Rec. 309–2.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, John A. Jones, clerk of the circuit court of the United States in and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings had thereon in a certain cause lately pending in said court, wherein Alexander Buchanan is plaintiff and The City of
38 Litchfield is defendant, as fully and completely as the same appears on file and of record in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this 24th day of September, in the year of our Lord eighteen hundred and seventy-seven, and of our Independence the one hundred and second year.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 309. Alexander Buchanan, pl'ff in error, *vs.* The City of Litchfield, Illinois. (Certificate of division.) S. Illinois C. C. U. S. Filed 15th October, 1877.

(Endorsed:) Filed March 15, 1881. J. A. Jones, clerk.

39 And thereupon, to wit, on the day last aforesaid (March 15th, A. D. 1881), there was issued out of said court a chancery subpœna in said cause, and was then delivered to the marshal of said district to execute, which subpœna and the "return" of said marshal thereto are in the words and figures following, to wit:

Chancery Subpœna.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

The United States of America to the City of Litchfield, Greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the southern district of Illinois, at Springfield, in said district, on the first Monday in the month of May next, to answer the bill of complaint of George William Ballou, this day filed in the clerk's office of said court, in said city of Springfield, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the
40 Supreme Court of the United States of America, at Springfield aforesaid, this fifteenth day of March, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and fifth year.

[L. S.] J. A. JONES, *Clerk.*

Memorandum.

The above-named defendant is notified that unless it shall enter its appearance in the clerk's office of said court, at Springfield, aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against it as confessed, and a decree entered accordingly.

J. A. JONES, *Clerk.*

Marshal's Return.

I hereby appoint Robert N. Paden my special deputy to execute this writ this 18th day of March, 1881.

JACOB WHEELER,
U. S. Marshal.

I have served the within writ upon the persons therein named in the following manner, to wit: Upon R. F. Bennett (mayor), on the 19th day of March, A. D. 1881, also upon Geo. W. Jones (city clerk), of the city of Litchfield, on the 19th day of March, A. D. 1881, by personally delivering to each of them a true copy of the same on the aforesaid days.

JACOB WHEELER,
U. S. Marshal,
41 By ROBERT N. PADEN,
Special Deputy.

Subscribed and sworn to before me this 19th day of March, A. D. 1881.

[L. S.] FRANK H. GILMORE,
Notary Public.

(Endorsed:) Filed March 24, A. D. 1881. J. A. Jones, clerk.

And afterwards, to wit, on Monday, the 2d day of May, at the January term of said court, in the year last aforesaid (A. D. 1881), the following proceedings were had in said court in said cause and entered of record, to wit:

Entry of Appearance by Defendant.

GEORGE WILLIAM BALLOU
vs.
CITY OF LITCHFIELD. } 6099. In Chancery.

This day comes the defendant by Messrs. Robinson, Knapp, and Shutt, its solicitors, and enters its appearance herein.

And afterwards, to wit, on the 3d day of June, in the year last aforesaid, came the defendant, by its solicitors, and filed in said cause its demurrer to complainant's bill, which said demur-
42 rer is in the words and figures following, to wit:

Demurrer to Bill.

In the United States Circuit Court of the Southern District of Illinois. June Term, A. D. 1881.

CITY OF LITCHFIELD *ats.* GEO. W. BALLOU. } In Chancery.

The joint and several demurrer of the City of Litchfield, defendants, to the bill of complaint of Geo. W. Ballou, the above-named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that the said complainant has not, in and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants, or any of them. Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable court whether they, or either of them, shall
43 be compelled to make any further or other answer to the said bill; and they humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

ROBINSON & SHUTT & HENRY S. GREEN,
Solicitors for Defendants.

(Endorsed:) Filed this 3d day of June, A. D. 1881. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 20th day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-two, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Overruling Demurrer to Bill.

GEORGE WILLIAM BALLOU *vs.* CITY OF LITCHFIELD. } 6099. In Chancery.

This day this cause came on to be heard upon defendant's demurrer to complainant's bill of complaint herein; and the court, having heard argument of counsel, and being sufficiently advised in the premises, overrules said demurrer.

44 And afterwards, to wit, on Wednesday, the 23d day of August, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Making New Parties Complainants, and Granting Leave to File Answers, Cross Bill, &c.

GEORGE WILLIAM BALLOU
vs. } 6099. In Chancery.
CITY OF LITCHFIELD.

And now at this day come the Portsmouth Savings Bank, Thomas B. Thayer, Peter Upton, James H. Thatcher, William F. Hallett; Azel Ames and Joel Ames, partners as A. & J. Ames; Lake Village Savings Bank, William R. Porter, Charles Jordan, Marcus Ames, Robert J. Adams, James P. Weston, Rollingsford Savings Bank, Penacook Savings Bank, Samuel F. Brown, George C. Pierce; Albert H. Nicholay and Albert H. Nicholay, Jr., partners under the firm name and style of A. H. Nicholay & Co., by Hay and Littler, their solicitors, and on their motion are made parties complainant herein, and thereupon the said complainants file their amended bill herein; and upon like motion the Holly Manufacturing Company is made defendant herein, and thereupon the said Holly Manufacturing Company, by Ralph Haynes, enters its appearance herein, and files its answer, and upon motion of Ralph Haynes, its solicitor, leave is granted to the said Holly Manufacturing Company to file
45 a cross-bill herein, and thereupon it files its cross-bill against the City of Litchfield; and it is thereupon ordered by the court, on motion of complainant's solicitor, that the said City of Litchfield answer the original, amended, and cross bill within thirty days from this date, and that a copy of the order be sent by the clerk to the solicitor of the said defendant.

And thereupon, to wit, on the day last aforesaid, came the said Portsmouth Savings Bank and others, by their solicitors, and filed in said clerk's office their amended bill in said cause; came also the Holly Manufacturing Company, by its solicitor, and files its answer to the original and amended bills, and also files its cross-bill in said cause against said City of Litchfield; which said amended bill, answer, and cross-bill are in the words and figures following, to wit:

Amended Bill.

In the Circuit Court of the United States, Southern District of Illinois. June Term, A. D. 1882.

PORTSMOUTH SAVINGS BANK, THOMAS B. THAYER, PETER UPTON, James H. Thatcher, William F. Hallett; Azel Ames and Joel Ames, partners as A. & J. Ames; Lake Village Savings Bank,
46 William R. Porter, Charles Jordan, Marcus Ames, Robert J. Adams, James P. Weston, Rollingsford Savings Bank, Penacook Savings Bank, Samuel F. Brown, George C. Pierce; Albert H. Nicholay and Albert H. Nicholay, Jr., partners under the firm name and style of A. H. Nicholay & Co.,

versus

THE CITY OF LITCHFIELD.

The Portsmouth Savings Bank, a corporation organized and ex-

isting under the laws of the State of New Hampshire, a resident and citizen of said State; Thomas B. Thayer, a resident and citizen of Massachusetts; Peter Upton, a resident and citizen of New Hampshire; Joseph H. Thatcher, a resident and citizen of New Hampshire; William F. Hallett, a resident and citizen of Maine; Azel Ames and Joel Ames, partners under the firm name of A. and J. Ames, residents and citizens of the State of Massachusetts; Lake Village Savings Bank, a corporation organized and existing under the laws of New Hampshire, a resident and citizen of said State; William R. Porter, a resident and citizen of the State of New Hampshire; Charles Jordan, a resident and citizen of the State of Massachusetts; Robert J. Adams, a resident and citizen of the State of Massachusetts; James P. Weston, a resident and citizen of the State of Massachusetts; Rollingsford Savings Bank, a corporation
47 organized and existing under the laws of the State of New Hampshire, a resident and citizen of said State; Penacook Savings Bank, a corporation organized and existing under the laws of the State of New Hampshire, a resident and citizen of said State; Marcus Ames, a resident and citizen of the State of Massachusetts; Samuel F. Brown, a resident and citizen of the State of New Hampshire; George C. Pierce, a resident and citizen of the State of Massachusetts, and Albert H. Nicholay and Albert H. Nicholay, Jr., partners under the firm name of A. H. Nicholay & Co., residents and citizens of the State of New York, by leave of the court having been made parties complainant herein, bring this their amended bill. And thereupon orators complain and show unto your honors that they are interested in the subject-matter of the original bill filed herein by George W. Ballou as follows, to wit:

The said Portsmouth Savings Bank own- ($12,500) twelve thousand five hundred dollars of the said bonds in the bill described; the said Thomas P. Thayer owns one thousand dollars of the said bonds; the said Peter Upton owns $2,000 of the said bonds; the said James H. Thatcher owns $3,000 dollars of the said bonds; the said William F. Hallett owns $500 dollars of the said bonds; the said Azel and Joel Ames own $10,000 dollars of the said bonds; the said Lake Village Savings Bank own- $2,000 dollars of the said bonds; the said William R. Porter owns $1,000 dollars of
48 the said bonds, and the said Charles Jordan owns $1,500 dollars of the said bonds; the said Robert J. Adams owns $500 dollars of the said bonds; the said James P. Weston owns $500 of the said bonds; the said Rollingsford Savings Bank owns $4,000 dollars of said bonds; the said Penacook Savings Bank owns $5,000 dollars of the said bonds, and the said Samuel F. Brown owns $1,000 dollars of the said bonds, and the said Marcus Ames owns $1,000 dollars of the said bonds, and the said George C. Pierce owns $1,500 dollars of the said bonds, and the said A. H. Nicholay & Co. own $3,000 dollars of the said bonds, which said several bonds embrace all the bonds described in complainants' original bill.

Orators further show that they purchased the said several bonds as aforesaid from the said George W. Ballou, for full value, before maturity, on representations that they were valid and legal obliga-

tions of said City of Litchfield, and paid full value therefor, and that they had no knowledge whatever that the said bonds, or any of them, were invalid at the time of their purchase as aforesaid.

Orators further show that they authorized the said George W. Ballou to file the original bill herein in their behalf, in his own name, as their trustee, on account of the great multiplicity of the holders, as herein set out; but that since the filing thereof
49 they have been advised that their rights and interest in the premises can be better enforced and protected by becoming parties to said bill than by prosecuting through the name of said George W. Ballou; and for these reasons they ask to be made party complainants.

Orators further show that they are informed and believe, and so state the fact to be, that all the allegations, matters, and things in the said original bill contained, except as to the legal ownership of said bonds, are true in manner and form as therein alleged, and, without here repeating the said allegations of said bill, they hereby make the same a part of this their bill, and ask that it be so treated on the hearing hereof.

And your orators further show that the Holly Manufacturing Company, a corporation of New York, claim some interest or lien in the water works described in said bill. Orators therefore ask that said Holly Manufacturing Company be made party defendants herein.

And orators also adopt the prayer of the said bill, and pray that the said defendant may be required to answer this their amended bill, under the rulings of this court; and, as in duty bound, orators will ever pray.

PORTSMOUTH SAVINGS BANK *et al.*,
By HAY & LITTLER, *Complainants' Solicitors.*

(Endorsed:) Filed August 23, 1882. J. A. Jones, clerk.

50 *Answer of Holly Manufacturing Co.*

In the Circuit Court of the United States, Southern District of Illinois. June Term, A. D. 1882. Chancery.

GEORGE W. BALLOU, THE PORTSMOUTH SAVINGS BANK, *et als.*,
versus
HOLLY MANUFACTURING COMPANY.

The answer of the Holly Manufacturing Company to the original and amended bill of complaint filed against it by George W. Ballou, The Portsmouth Savings Bank, and others.

This respondent, for answer to so much of said original bill and amended bill of complaint as it is advised it is material for it to answer unto, says:

That on the 23d day of March, A. D. 1874, it made a certain agreement in writing with the said City of Litchfield, in and by which said agreement respondent agreed to and with the said city to furnish divers materials, machinery, &c., for the said water works

in the original bill described, and to do and perform divers work, service, and labor in and about the construction of said water works and the placing of said machinery for use, &c., for all of which the said city by the said agreement in writing promised to pay respondent the sum of fifteen thousand dollars; that by a certain
51 clause of said agreement the said city reserved the option until the first day of June then next following to pay three thousand dollars of said sum of fifteen thousand dollars in the treasury warrants of said city, which said warrants were to be payable in one, two, and three years from the date of the completion of the machinery, &c., in the said written agreement described, with ten per cent. per annum interest thereon, interest payable semi-annually.

That respondent, in pursuance of said agreement, furnished all the material and machinery and performed all the labor and service in the manner and within the time prescribed thereby to the entire satisfaction of said City of Litchfield, and, in short, fully kept and performed all the provisions of said contract which were to be by it kept and performed, and the said city received the said material, machinery, labor, &c., and paid respondent the stipulated price therefor, except the amount of the following-described city warrants, which were issued in pursuance of the terms of said contract in part payment therefor, to wit:

One warrant for the sum of $866.66, dated March 15, 1875, due one year from date, with 10 per cent. interest per annum, interest payable semi-annually. Also, one warrant for the sum of $866.67, dated March 15, 1875, due two years from date, at ten per cent. per annum, interest payable semi-annually.

52 Also one warrant for the sum of $866.67, dated March 15, 1875, payable three years from date, with ten per cent. interest per annum, interest payable semi-annually, which said warrants represent the unpaid balance of the purchase-money of the said material, machinery, labor, &c., furnished under the written contract aforesaid. For greater certainty as to the contents of the said written agreement and the said warrants respondent files the same herewith, marked respectively "A," "B," C," & "D," and asks that they be taken and considered as part of its answer.

That payment of the said warrants and each of them has been often demanded of the said city, and that payment thereof has been refused on the ground that there were no funds out of which payment could be made, and also on the ground that the city had no power to make the said contract or to issue the said warrants in payment thereof.

Respondent shows that it is informed and believes, and so states the fact to be, that the city had no power to make said contract or to issue said warrants, notwithstanding the fact that said city represented and claimed to respondent that it possessed full power to make said contract and to issue said warrants. And respondent states the fact to be that it contracted with said city as aforesaid, fully believing that said city had the right to contract in
53 manner and form as aforesaid, and respondent brings said

contract and said warrants here into court and offers to surrender the same to the said city under the direction of this honorable court. That it is true the said George W. Ballou, in his original bill, has given substantially a correct description of said water works as constructed in part by respondent, and that all the allegations thereof in relation to the manner in which the said works were constructed, the uses to which they were put, and the benefits arising therefrom to the city, are substantially true as stated in said original bill. And now respondent having fully answered said original and amended bill asks to be hence dismissed with its reasonable costs, &c.

R. W. HAYNES,
Solicitor for Respondent.

(Endorsed:) Filed August 23, 1882. J. A. Jones, clerk.

Exhibit "A," to Answer of Holly M'f'g Co.

$866.66. No. 47.

The City of Litchfield, Ill., will pay to the order of Holly Manufacturing Company eight hundred sixty-six $\frac{66}{100}$ dollars, in one year from date, in lawful money, with interest from date at 10 per cent. per annum, payable semi-annually, for value received, principal and interest payable at the Nassau Bank, in the city of New
54 York, payable from funds of water works.

Dated at Litchfield, Ill., March 15th, A. D. 1875.

S. M. GRUBBS, *Mayor.*

[L. S.] Attest: B. S. HOOD, *City Clerk.*

(Endorsed:) Filed August 23, 1882. J. A. Jones, clerk.

Exhibit "B" to Answer of Holly M'f'g Co.

$866.67. No. 48.

The City of Litchfield, Ill., will pay to the order of The Holly Manufacturing Company eight hundred sixty-six $\frac{67}{100}$ dollars, in two years from date, in lawful money, with interest from date at 10 per cent. per annum, payable semi-annually, for value received, principal and interest payable at the Nassau Bank, in the city of New York. Payable from funds of water works. Dated at Litchfield, Ill., M'ch 15th, A. D. 1875.

S. M. GRUBBS, *Mayor.*

[L. S.] Attest: B. S. HOOD, *City Clerk.*

(Endorsed:) Filed August 23, 1882. J. A. Jones, clerk.

Exhibit "C" to Answer of Holly M'f'g Co.

$866.67. No. 49.

The City of Litchfield, Ill., will pay to the order of The Holly Manufacturing Company eight hundred sixty-six $\frac{67}{100}$ dollars in three years from date, in lawful money, with interest from date at 10 per cent. per annum, payable semi-annually, for value received,

principal and interest payable at the Nassau Bank, in the city of New York. Payable from funds of water works. Dated at
55 Litchfield, Ill., March 15th, A. D. 1875.

S. M. GRUBBS, *Mayor.*

[L. S.] Attest: B. S. HOOD, *City Clerk.*

(Endorsed:) Eiled August 23, 1882. J. A. Jones, clerk.

Exhibit "D" to Answer of Holly M'f'g Co.

Contract for Holly Water Works Machinery.

This agreement, made and executed in duplicate this 23d day of March, 1874, by and between The Holly Manufacturing Company, a corporation duly organized under the laws of the State of New York, and having its chief place of business in the city of Lockport, in the State aforesaid, of the first part, and The City of Litchfield, Montgomery county & the State of Illinois, party of the second part, witnesseth: That in consideration of the premises herein contained the said parties agree to and with each other as follows, to wit:

The party of the first part agrees to provide and furnish all the materials, and to build and complete in a good and workmanlike manner for the party of the second part, a set of machinery to supply water and protect property from destruction by fire under letters patent granted to Birdsill Holly, and to consist of the following: Two steam cylinders, each 10 inches in diameter and 20 inches stroke, erected on a heavy arched iron frame, making one pair
56 of double cylinder, quarter crank, condensing steam engine with Holly's patent variable cut-off, to be provided with appurtenances to automatically control the steam inlet valves by the varying pressure of water in the mains so as to admit more or less steam to the engine, thus applying power in the proportion due to the quantity of water required, from time to time, to meet the constantly varying demands of consumers, said engines to be arranged to run either high or low pressure. There shall be attached to the said frame two double-acting pumping engines, each connected directly with and to be driven by one of the above-named steam cylinders, and so arranged that they may be run singly or both together. Two horizontal tubular steam boilers, each 54 inches in diameter and 12 feet long, with flues not less than 4 inches in diameter, & guaranteed of sufficient capacity to supply steam to the engines and enable them to perform the duty herein set forth. One Holly's patent hydrostatic water-supply regulator for controlling the pressure of water in the main pipes and enabling the operator to vary the same for domestic uses or fire protection at pleasure; said regulator to control the pressure (by regulating the engines) at a uniform degree, whether for domestic uses or fire duty, without wasting water through a safety valve or through an aperture in the pumps, mains, or
57 pipes. One Holly's patent-ject-condenser, & heater combined, by which the change from high to low pressure, or *vice versa*, may be quickly made without stopping the engines. One air pump, a boler-bed pump, a donkey engine, and all the necessary gearing,

shafting, couplings, pillow blocks, steam pipes, & valves, safety valves, steam motes, and vacuum gauges, fire fronts, grate bars, & breeching for the boilers; also all other machinery needed inside the building in which it is to be placed, as hereafter provided, to make the said machinery effective and competent to fulfill the guarantees of the party of the first part, except as hereinafter agreed to be furnished and performed by the party of the second part.

The party of the first part agrees to have the said machinery ready for shipment on or before the first day of June, 1874, and to ship the same to the party of the second part, subject to the payment by the party of the first part of freight and charges from the manufactory of the party of the first part, to and including its reception inside the building in which it is to be set up, as hereinafter provided.

The party of the first part further agrees that upon the reception, as aforesaid, in said building, it will put together, set up, finish, and adjust the said machinery by or before the 1st day of July, 1874; and hereby agrees and guarantees that it shall have power and capacity to deliver and supply by pumping directly through street mains of sufficient size, strength, and tightness (which
58 said mains are to be furnished by the party of the second part as hereinafter provided), 650,000 gallons of water in 24 hours, against a pressure of forty pounds to the square inch.

The party of the first part also agree that in the performance of fire service said machinery shall have power to throw two fire streams one inch in diameter directly through hydrants, and one section of hose to be furnished and set, as hereinafter provided, and without any intermediate power of fire engines or other agency, to a height of 100 feet from elevations not exceeding 50 feet above the source of supply, or three such streams one inch in diameter to the height of 75 feet (instead of two streams 100 feet high).

It is expressly understood that should there be any unusual delay in the transportation of the said machinery from the place of manufacture at Lockport, N. Y., to the City of Litchfield, or if the buildings & foundations for said machinery should not be completed and in readiness for the said machinery upon its arrival at said City of Litchfield, then in either or both such cases the time for the completion shall be extended in proportion to such delay.

The said Holly M'f'g Co. hereby guarantee that the said engines, pumps, and boilers shall be completed to perform a duty equal to any other pumping machinery in the United States under like conditions of service, or that the said engines & pumps will supply 143,000 gallons of water in twenty-four hours against a pres-
59 sure of 40 pounds to the square inch, with an expenditure of 1,200 pounds of the best coal slack. Said machinery to be of the same style of piston engines & pumps as that made by the Holly M'f'g Co. for and in use at the city of Bay City, Michigan, and to include all the latest improvements. The frame of the above-described machinery shall be fitted so that engines & pumps in duplicate of those described above may be added at any time hereafter, and the Holly M'f'g Co. hereby agree to make such addition

at any time within three years from the date hereof, and after reasonable notice, at a cost to said City of Litchfield not exceeding five thousand dollars.

The said Holly M'f'g Co. agree to furnish the plans for foundation, as hereinafter stated, without charge.

It is further understood and agreed by and between the parties hereto that within 30 days after the above-named machinery is set up and adjusted, as above directed, it shall be subjected to a test, in order to determine whether it fulfills the guarantees above named; and upon such fulfillment it shall be accepted by the party of the second part and paid for in full, as hereinafter provided. And if the party of the second part shall neglect or fail to do and provide the things specified to be done and provided by it, as herein stated, in order that said machinery may be set up and adjusted and
60 tested by the party of the first part for more than 30 days after the said machinery is in readiness therefor (unless it shall have been prevented by unavoidable casualty), then, and in that case, the entire remaining balance unpaid shall become due and payable to the party of the first part.

For which materials, machinery, and work above agreed to be furnished, made, and done by the party of the first part, and in full satisfaction for the same complete and finished and tested as above specified, the party of the second part agrees to pay to the party of the first part the sum of fifteen thousand (15,00-) dollars *dollars*, to be paid as follows, to wit: Twenty per cent. of the above sum on the first day of April next, thirty per cent. of the above sum on the first day of May next, thirty per cent. of the above sum on the first day of June next, and the balance of (20) twenty per cent. when the said machinery shall have been fully completed, set up, and tested as aforesaid, and until such payments are fully made the party of the first part shall have a lien upon all the said machinery and fixtures made and furnished by said party of [the] first part as security for and balance remaining unpaid.

The Holly M'f'g Co. agree to accept for such payments the water bonds of said City of Litchfield, which bonds are to be of the denomination of $500 each, to bear interest at the rate of ten (10) per cent. per annum, payable semi-annually, with interest coupons at-
61 tached, interest & principal payable in the city of New York, it being understood that said bonds are issued strictly in accordance with law. Said bonds to be so received in payment at their par value, with accrued interest to date of payments added. Principal of bonds payable in 20 years from January 1st, 1874. The said Holly M'f'g Co. agree to deliver to the said city of Litchfield a good & sufficient bond for the faithful performance of all the covenants & guarantees made on its part in this agreement, which bond shall be in the sum of thirty thousand dollars, and executed by not less than four responsible individuals.

The party of the second part agrees to erect a suitable building for the reception and setting up of said machinery, and also to provide proper foundations for the same, according to plans and specifications, to be furnished without extra charge by the party of the first part.

The said party of the second part also agrees to furnish and put in suction and discharge pipes leading to and from the pumps, comprising a part of the said set of machinery. The party of the second part also agrees to provide and do all brick, stone, wood, mason, and carpenter work within the building in which said machinery is to be placed, it being the intent and meaning of this agreement that the party of the second part shall provide building, foundations, smoke stack, smoke pipes, and all other structures and work,
62 including stone cutting and drilling, so that the party of the first — may conveniently and expeditiously put together, set up, and adjust the machinery furnished by it under this agreement; and in case upon arrival of said machinery the building and other preparations for its receptions are not completed the party of the second part agrees to take care of and protect from injury said machinery, and pay all damages and expenses which may accrue on account of its exposure to the elements or otherwise, and will also pay all expenses incurred by the party of the first part in testing the street mains furnished and laid by the party of the second part.

The party of the second part further agreed that the said building, foundations, and other preparations for the reception of said machinery shall be completed and in readiness for the setting up of the same or or before the first day of June next. And any expenses incurred by the party of the first part by reason of the same not being so completed and in readiness by the time above specified shall be paid by the party of the second part.

The party of the second part further agrees that it will lay the necessary mains or water pipes up to and within said building and foundation and to extend the same throughout the streets of said City of Litchfield, so that in length, size, strength, and tightness they shall in every way be suitable for the fulfillment of
63 the tests required of the party of the first part, the said pipes to be furnished and laid as above specified on or before the day of July next. The said City of Litchfield shall have the option until the first day of June next of paying three thousand dollars in the City of Litchfield treasury warrants, which warrants are to be made payable in one, two, & three years from the date of the completion of the machinery and to bear interest at the rate of ten (10) per cent. per annum, payable semi-annually, instead of bonds in like amount, said warrants to be made a part of the last payment on this contract.

In witness whereof the party of the first part has caused its corporate seal to be hereto affixed and these presents signed by its treasurer, and the said party of the second part hath caused its corporate seal to be hereto affixed and these presents to be signed by its mayor & city clerk the day & year first written above.

[L. S.] C. G. HILDRETH,
Treasurer Holly Mf. Co.
W. S. PALMER, *Mayor.*

Attest: [L. S.] B. S. HOOD, *City Clerk.*

(Endorsed:) Filed August 23, 1882. J. A. Jones, clerk.

64 *Cross-Bill of Holly M'f'g Co.*

In the Circuit Court of the United States, Southern District of Illinois. June Term, A. D. 1882.

HOLLY MANUFACTURING COMPANY, Complainant,
versus
THE CITY OF LITCHFIELD, Defendant. } Cross-Bill.

To the hon. the judges of said circuit court in chancery sitting:

The Holly Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of New York, a citizen and resident of said State, brings this its cross-bill against the City of Litchfield, a municipal corporation organized and existing under the laws of the State of Illinois, a resident and citizen of said State and of the district aforesaid, and thereupon your orator complains and shows unto your honors that heretofore, to wit, on the 15th day of March, 1881, George W. Ballou filed his original bill in this court against the City of Litchfield, charging in substance that it purchased fifty thousand dollars of the bonds of said city, issued for the purpose of constructing a water works therefor; that the money arising from the sale of said bonds was applied in the construction of said works; that after the receipt of the
65 money as aforesaid, and the construction of said works as aforesaid, that said city refused to pay interest on said bonds, and that said bonds were adjudicated by the Supreme Court of the United States to be null and void, for want of power in the said corporation to issue the same; said bill also contains a description of the real estate upon which the said water works are located.

Orator further shows that the Portsmouth Savings Bank and divers other parties have been made parties complainant to said bill, and have filed their amended bill in said cause. For greater certainty as to the contents of said original bill reference is here made to the same.

Orator further shows that it has filed its answer to said original and amended bill, in and by which it sets forth, among other things, that the said City of Litchfield is justly indebted to it to the amount of the three certain said city warrants described in said answer, to the amount of over $2,500, with interest, as stated in said answer. Said answer is made a part of this cross-bill, and prayed to be taken and considered as such on the hearing of this cause.

In consideration of all which, and inasmuch as orator is remediless at law in the premises, it prays your honors to take cogni-
66 zance of this its cross-bill, that said City of Litchfield may be made party defendant herein, that process may issue against said city out of this honorable court, under the seal thereof, directed, &c., returnable, &c., and grant that the said defendant may, under the rule of this court, be required to answer all and singular the allegations, matters, and things in this cross-bill contained, fully and specifically, but not under oath, however, the oath of said defendant being expressly waived, and grant that an account may be taken of the amount due your orator on account of the material,

machinery, labor, and service furnished said city at its special instance and request, and, upon the final hearing hereof, grant to order and decree the payment of said sum so found to be due upon the statement of the account as aforesaid, within a short time to be fixed by this court, and further grant to order and decree a lien in favor of orator upon said water works, and that orator be permitted to share *pro rata* with the complainants in said original bill in the proceeds arising from the sale of said works under any decree which your honors may render in favor of said complainants; and in case said works will not sell for a sum sufficient to pay the whole amount which may be found due to your orator on said settlement
67 of account as aforesaid under said *pro rata* distribution, your orator further prays that the said city may be required to pay any balance so remaining out of any funds that may then be in the treasury thereof not otherwise appropriated, and, in case there are no funds, or insufficient funds, for said purpose, then your orator prays that said city may be required to levy and collect a tax upon the taxable property thereof for said purpose, and grant unto your orator such other further and general relief in the premises as the nature and equities of its case may require, and as unto your honors shall seem meet and proper. And, as in duty bound, orator will ever pray, &c.

HOLLY WATER WORKS,
By R. W. HAYNES,
Its Solicitor.

(Endorsed:) Filed August 23, 1882. J. A. Jones, clerk.

And afterwards, to wit, on the 23d day of September, in the year last aforesaid, came the City of Litchfield, defendant, by its solicitors, and filed in said clerk's office its motion to strike amended bill from files in said cause, which motion is in the words and figures following, to wit:

68 *Motion to Strike Amended Bill From Files.*

In the United States Circuit Court, Southern District of Illinois.

GEORGE WM. BALLOU *vs.* THE CITY OF LITCHFIELD.

And now on this 23d day of September, 1882, comes the defendant and moves the court here to strike the amended bill of the Portsmouth Savings Bank and others, herein filed, from the files of this court for the reasons following:

First. Because the said pretended amendment was filed without notice to the defendant.

Second. Because pretended amendment is in fact a new bill by parties altogether other and different from the complainant in the original bill.

Third. Because the case made by the pretended amendment is entirely inconsistent with the allegations of the original bill of George Wm. Ballou, and proceeds upon the ground that the said Ballou has no interest in the litigation.

Fourth. Because the said pretended amendment does not relate to matters germain to the original bill of said Ballou.

STUART, EDWARDS & BROWN &
PALMERS, ROBINSON & SHUTT,
Sols. for Def't.

(Endorsed:) Filed September 23, 1882. J. A. Jones, clerk.

69 And afterwards, to wit, on Thursday, the 28th day of September, at the June term of said court, and in the year last aforesaid (A. D. 1882), the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Overruling Motion to Strike Amended Bill From Files, &c.

GEORGE WILLIAM BALLOU *et al.*
vs.
CITY OF LITCHFIELD *et al.*
} 6099. In Chancery.

And now on this 28th day of September, 1882, come the parties, by their counsel, and submit to the court the motion of the defendant, the City of Litchfield, to strike the amended bill, filed August 23, 1882, from the files; and the court, having heard arguments of counsel thereon, and being sufficiently advised in the premises, doth order and decree that said motion be overruled. And on motion of complainants, by their counsel, it is ordered by the court that the defendant, the City of Litchfield, file its answer to the original and amended bills in twenty days from this date.

And afterwards, to wit, on the 1st day of December, in the year last aforesaid, came the City of Litchfield, defendant, by its solicitors, and filed in said clerk's office its answer to the original
70 and amended bills, also its answer to the cross-bill in said cause, which said answers are in the words and figures following, to wit:

Answer of City of Litchfield to Original & Amended Bill.

In the Circuit Court of the United States, Southern District of Illinois.

GEORGE W. BALLOU, THE PORTSMOUTH SAVINGS BANK, THOMAS B Thayer, Peter Upton, James H. Thatcher, William F. Hallett; Azel Ames & Joel Ames, partners as A. & J. Ames; Lake Village Savings Bank, William R. Porter, Charles Jordan, Marcus Ames, Robert J. Adams, James P. Weston, Rollingsford Savings Bank, Penacook Savings Bank, Samuel T. Brown, George C. Pierce; Albert H. Nicholay and Albert H. Nicholay, Jr., partners as A. H. Nicholay & Co., Complainants,

vs.

THE CITY OF LITCHFIELD, Defendant.

The answer of the City of Litchfield, defendant, to the original and amended bills of complaint of the above-named complainants filed herein.

This defendant, saving and reserving to itself all manner of benefit and advantage which — or may be taken to the many errors,
71 uncertainties, and insufficiencies in the said original and amended bills contained, for answer thereto, or unto so much or such parts thereof as it is advised is material for it to make answer unto, answering, says:

First. That this defendant admits the incorporation and organization of the defendant as a municipal corporation, with the power contained and specified in its act of incorporation and the general laws of the State of Illinois applicable to such municipal corporations, and that the act of incorporation is printed at large at page 181 of the Private Laws of 1859 of the State of Illinois; and, further, that the said defendant was so organized prior to the issue of the pretended bonds in the said bill described.

Second. This defendant admits the due passage on the 15th day of April, 1873, by the General Assembly of the State of Illinois, of an act entitled "An act authorizing cities, incorporated towns, and villages to construct and maintain water works," and that the said act is still in full force and effect, as in said bill in that behalf is alleged.

Third. This defendant, further answering, admits that on the 4th day of December, A. D. 1873, the city council of the city of Litchfield adopted and passed an ordinance in the terms and tenor as set forth, and copied at large in said bill in that behalf.

72 Fourth. Defendant admits that the then mayor and city clerk of the said city of Litchfield did make and execute, under the corporate seal of said city, one hundred partly written and partly printed papers, numbered from one to one hundred, both inclusive, which said papers were each of the tenor of the paper copied at large in the complainant's bill in that behalf, and therein referred as a bond of said city. But this defendant expressly denies it to be true, as in said bill alleged, that the said papers were or are the bonds or obligations of this defendant, and further ex-

pressly denies that the same were made or issued in pursuance of the act of the General Assembly hereinbefore mentioned, but defendant charges the truth to be that the said pretended bonds, and each of them, was made and executed without any authority in law, and were and — wholly void and of no effect.

Fifth. And this defendant, further answering as to so much and such parts of said bill as charges and sets forth that "said bonds, and each of them, the said city, by its authorities aforesaid, claimed and assented to be binding and valid obligations thereof, and as such recommended their purchase to orators and others," says that it denies all and singular such allegations to be true as in said bill in that behalf alleged, and defendant charges the
73 truth to be that no such claim or assertion was made by any person or persons in that behalf authorized by the said city; and if any claim or assertion was ever made by any person holding office in the said city in respect to the validity of said pretended bonds, such claim or assertion was but the expression of the individual opinion of the person making such claim or assertion upon questions of law, and for which this defendant was and is in no sense responsible.

Sixth. Defendant admits that the said complainant, George W. Ballou, at the times in the bill in that behalf mentioned, purchased said pretended bonds to the amounts in the said bill in that behalf described, but whether he did so upon the representations of the city authorities, or as to whether he relied upon the law and ordinance aforesaid, or as to whether he fully believed that the city had the right to issue said bonds, this defendant is not informed, and is therefore unable to admit or deny the same, but prays that if such allegations are material that the complainant may be required to make strict proof thereof.

Seventh. Defendant admits that it has failed and refused to pay the interest or principal of said pretended bonds, and that it denies all legal obligation to do so, but denies it has repudiated any
74 legal obligation, and expressly charges the truth to be that it has no legal power to pay, or means with which to pay, the said pretended bonds or any sum of money advanced on account thereof.

Eighth. Defendant admits that the litigation between Alexander Buchanan and this defendant, and the result and effect thereof, is stated with substantial accuracy in said bill, but prays to refer to the records of this court and the Supreme Court of the United States therein for greater certainty in respect thereto.

Ninth. Defendant admits it to be true, as in said bill alleged, that the said sum of money, amounting to $48,014.84, paid by the said George W. Ballou on account of said pretended bonds, was received by the persons who sold and delivered the said pretended bonds to him at the times and in the sums as in said bill is alleged, and that the persons so receiving the said sums of money were at the times they so received the same officers of the city of Litchfield, and that the said sums of money were paid into the said city treasury of said city, and that the said sums of money have not been returned to said Ballou, and it is also true that this defendant denies its liability to

repay the same, but it does so solely on account of its legal inability and incapacity, as will hereafter be more particularly shown.

Defendant, as to so much of said bill as charges "that with the money arising from the sale of the bonds aforesaid the said
75 city, by its proper authorities, proceeded to construct a system of water works, which said works are now completed and in full operation, and that the benefits thereof are being enjoyed by the city and its inhabitants," this defendant, answering, says that he denies all and singular such allegations to be true, as therein stated.

Defendant admits that the description of the lands upon which the buildings and machinery necessary to supply the city with water are located is correctly set forth in said bill, and that the title to said lands is in the city of Litchfield, and further admits that the remainder of said works, consisting of hydrants, water pipes, and other appurtenances, are distributed throughout the said city, as in the said bill is alleged.

But as to so much and such parts of said bill as charges and sets forth that "said water works, real estate, machinery, hydrants, water pipes, and all other appurtenances thereunto belonging, as well as the cost of the labor expended in the erection and completion thereof, was paid for by said city with money arising from the sale of the bonds aforesaid," this defendant, answering, says that it denies all and singular such allegations to be true as in said bill set forth and alleged, and expressly charges the truth in respect to the
76 construction of said water works and the manner in which the funds for their construction were derived to be:

That on or about the first day of April, 1873, the city of Litchfield was the owner and before that time had purchased and fully paid for the lands in the bill described, and prior to that time had passed by its city council an ordinance for the construction of water works, and had contracted with proper persons for the construction thereof, and had before the issuing of the pretended bonds in the said bill mentioned expended in the construction thereof a large sum of money, to wit, about $60,000, which money had been raised by general taxation upon persons and property within the said city, aand that on or about the 4th day of December, 1873, the said ordinance in the said bill described was passed, and the said pretended bonds in the said bill described were afterwards from time to time issued and sold to said Ballou, and the funds derived therefrom received into the treasury of said city, and paid out from time to time upon the order of the city authorities, not only in payment for labor and materials in the construction of said water works, but in the payment of the other necessary charges and expenses of said city.

And this defendant, further answering, says that prior to the issuing of the said pretended bonds in the said bill mentioned,
77 and to the alleged contracting of the said pretended indebtedness by this defendant to the said Ballou, there was then, and still continues to be, in force, as part of the constitution of the State of Illinois, the following provision:

"Article IX.

SECTION 12. No county, city, township, school, district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment, for State and county taxes, previous to the incurring of such indebtedness."

Which said provision of said constitution was in force from and after the 8th day of August, 1870.

And defendant, further answering, says that at the time of the issuing of the said pretended bonds in the bill described, and the payment of the said sums of money by said Ballou to the city of Litchfield, which payment is charged by said bill to have created an indebtedness upon the said city to said Ballou, the said city of Litchfield was then justly indebted to divers persons in a large sum of money, to wit, the sum of seventy thousand dollars ($70,000), exclusive of the amounts of the said pretended bonds, and of the sums of money advanced to said city by said Ballou; and that the value of the taxable property in said city as ascertained by the assessment
78 thereof for taxation for State and county purposes for the year 1873, the same being the last assessment thereof for the purposes aforesaid prior to the time when said pretended bonds were issued, and the said sums of money were paid by said Ballou was $1,400,000 and no more. Wherefore defendant charges the truth to be that the said City of Litchfield, being at the time aforesaid indebted in an amount equal to five per centum on the value of the taxable property therein as ascertained by the last assessment for State and county purposes, was incapable, either in law or equity, of becoming in any manner or for any purpose indebted in any further sum, whether by the issue of bonds or receipt of money by its officers or otherwise. And this defendant therefore denies that it is in any manner indebted to the said Ballou or to the other complainants in said bill, in any sum of money, or on any account whatever. And this defendant as to so much and such parts of the said bill as states and sets forth the rights and interests of the said complainants other than the said George W. Ballou, and their purchase from him of the said pretended bonds, defendant knows nothing of the truth of such allegations and can neither admit nor deny the same, but this defendant says that it never, at any time, had any dealings whatever with any of the said complainants, and never re-
79 ceived any sum of money from any or either of them, and expressly denies that it is in manner indebted to any or either of them.

And the said defendant in addition to the foregoing answer avers that the cause of action, if any there be, arising to the complainants on account or by reason of the several allegations and complaints in their said bill contained did not accrue within five years before their said bill was filed, and this allegation the defendant makes in

bar of the complainants' bill, and prays that it may have the benefit thereof and therefrom, as if it had formerly pleaded the same.

And this defendant submits to this honorable court that all and every of the matters in the said complainants' bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the complainants are not entitled to any relief in a court of equity; and this defendant hopes he shall have the same benefit of the defence as if he had demurred to the said bill.

And this defendant having now freely answered, prays to be hence dismissed with reasonable costs and charges in this behalf most wrongfully sustained.

THE CITY OF LITCHFIELD,
Defendant.

STUART, EDWARDS & BROWN,
PALMERS, ROBINSON & SHUTT,
Sol's for Def't.

(Endorsed:) Filed December 1, 1882. J. A. Jones, clerk.

80 *Answer of City of Litchfield to Cross-Bill.*

In the United States Circuit Court, Southern District of Illinois.

THE HOLLY MANUFACTURING COMPANY, Complainant,
vs.
THE CITY OF LITCHFIELD, Defendant. } Cross-Bill.

The answer of the City of Litchfield to the cross-bill of The Holly Manufacturing Company.

This defendant, for answer unto said cross-bill, or so much and such parts thereof as it is advised is material to be answered, says:

That this defendant has filed its answer to the original and amended bills of George W. Ballou and others, filed in this court, and to which reference is made in the said cross-bill, and defendant prays that said answer may be taken and considered as part of its answer to this cross-bill.

Defendant, further answering, admits the execution of the contract referred to in said cross-bill, and admits that the said complainant fully performed and completed said contract according to its terms and to the satisfaction of defendant.

Defendant admits the execution of the said city warrants in the said cross-bill mentioned, and admits that the amounts thereof have not been paid, upon the grond that the said defendant had
81 no power to make the said contract or issue said warrants.

Defendant admits that for the reasons stated in its answer to the original bill herein it denies its power to make said contract or to issue said warrants, but denies that this defendant represented or claimed that it had such power.

And denies now, for said reasons stated in said answer to said original bill, that it is in any manner indebted to said complainant, or that he is entitled to any relief against the defendant.

And this defendant submits to this honorable court that all and every of the matters complained of in said cross-bill are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief in a court of equity. And this defendant hopes he shall have the same benefit of this defence as if had demurred to said cross-bill.

And the said defendant avers that the cause of action or right to relief, if any there may be, arising to the complainant on account or by reason of the several allegations of said cross-bill, did not arise or accrue within five years before said cross-bill was filed. And this allegation this defendant makes in bar of the said cross-bill and of the relief thereby prayed, and prays that it may have the
82 same benefit therefrom as if it had formally pleaded the same.

And now, having fully answered, the defendant prays to be hence dismissed, with costs, &c.

THE CITY OF LITCHFIELD,
By STUART, EDWARDS & BROWN,
PALMERS, ROBINSON & SHUTT, *Its Sol's.*

(Endorsed:) Filed December 1, 1882. J. A. Jones, clerk.

And afterwards, to wit, on the 2d day of December, in the year last aforesaid, came George Wm. Ballou and others, complainants in the original and amended bills, and filed their replication to defendant's answer; also came The Holly Manufacturing Company, complainant in the cross-bill, and filed its replication to defendant's answer; which said replications are in the words and figures following, to wit:

Replication of Geo. Wm. Ballou and Others.

In the Circuit Court of the United States, Southern District of Illinois. June Term, A. D. 1882.

GEORGE W. BALLOU *et als. versus* THE CITY OF LITCHFIELD.

The replication of George W. Ballou, The Portsmouth Sav-
83 ings Bank, Thomas B. Thayer, Peter Upton, James H. Thatcher, William F. Hallett; Azel Ames and Joel Ames, partners, as A. & J. Ames; Lake Village Savings Bank, William R. Porter, Charles Jordan, Marcus Ames, Robert J. Adams, James P. Weston, Rollingsford Savings Bank, Penacook Savings Bank, Samuel T. Brown, George C. Pierce; Albert H. Nicholay and Albert H. Nicholay, Jr., partners, as A. H. Nicholay & Co., complainants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in

the said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove, as this honorable court shall direct; and humbly pray as in and by their said bill they hath already prayed.

GEORGE W. BALLOU,
THOMAS B. THAYER,
JAMES H. THATCHER,
THE PORTSMOUTH SAVINGS BANK,
PETER UPTON,
WILLIAM F. HALLETT;
84 AZEL AMES AND JOEL AMES,
Partners, as A. & J. Ames;
CHARLES JORDAN,
ROBERT J. ADAMS,
ROLLINGSFORD SAVINGS BANK,
SAMUEL T. BROWN,
LAKE VILLAGE SAVINGS BANK,
WILLIAM R. PORTER,
MARCUS AMES,
JAMES P. WESTON,
PENACOOK SAVINGS BANK,
GEORGE C. PIERCE;
ALBERT H. NICHOLAY AND
ALBERT H. NICHOLAY, JR.,
Partners, as A. H. Nicholay & Co.;
By MILTON HAY,
DAVID T. LITTLER, *Their Solicitors.*

(Endorsed:) Filed Dec'r 2d, 1882. J. A. Jones, clerk.

Replication of Holly M'f'g Co.

In the Circuit Court of the United States, Southern District of Illinois. June Term, A. D. 1882.

THE HOLLY MANUFACTURING COMPANY, Complainant,
versus
THE CITY OF LITCHFIELD, Defendant. } On Cross-Bill.

The replication of the Holly Manufacturing Company.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith: That it will aver and
85 prove its said cross-bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true. All which matters and things this repliant is and will be

ready to aver and prove, as this honorable court shall direct, and humbly prays as in and by its said cross-bill it hath already prayed.

THE HOLLY MANUFACTURING COMPANY,
By RALPH W. HAYNES, *its Solicitor.*

(Endorsed:) Filed Dec'r 2d, 1882. J. A. Jones, clerk.

And afterwards, to wit, on Monday, the 19th day of February, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-three, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Referring Cause to Master in Ch'y.

GEORGE WILLIAM BALLOU *et al.*
vs.
CITY OF LITCHFIELD. } 6099. In Chancery.

86 On motion of complainants, by D. T. Littler, Esq., their solicitor, this cause is referred to the master in chancery of this court, to take and report any testimony which may be produced before him by either party, on reasonable notice being given to opposite party or solicitor.

And afterwards to wit, on the 26th day of September, in the year last aforesaid (A. D. 1883), came the parties by their solicitors and filed a stipulation in said cause; which stipulation is in the words and figures following, to wit:

Stipulation for Hearing.

In the United States Circuit Court.

GEO. WILLIAM BALLOU
vs.
THE CITY OF LITCHFIELD. } In Chancery.

It is stipulated that this cause be set for hearing for Tuesday, Oct. 9th.

HAY & LITTLER,
For Complainants.
PALMERS, ROBINSON & SHUTT,
STUART, EDWARDS & BROWN,
For Def't.

Sept. 26, 1883.

(Endorsed:) Filed September 26, 1883. J. A. Jones, clerk.

87 COMPLAINANTS' TESTIMONY.

1. *Deposition of Geo. Wm. Ballou.*

The said GEORGE W. BALLOU, being first duly sworn, testified and deposed as follows:

Interrogatory First. State your name, age, residence, and occupation.

Answer. My name is George William Ballou; I reside in New-

York city, and I am a banker and broker by occupation; my age is thirty-four.

Int. Second. Are you or not acquainted with the parties to this suit; and if so, how long have you known them, respectively, or any of them; and are you the same George W. Ballou who filed the original bill in this case?

Answer. I am not personally acquainted with any of the corporate authorities of the City of Litchfield; I am the same George William Ballou who filed the original bill in this case, and I am personally acquainted with all my co-complainants.

Int. Third. Did you or not ever purchase any bonds of the City of Litchfield, the defendant, in this case; if yea, state when, where, and how many of such bonds you purchased, and the price or prices paid for the same; please attach to your answer to this interrogatory a complete list of said purchases, showing the date and amount of each purchase with the amount paid therefor.

88 Answer. I did purchase bonds of the City of Litchfield at different times. I attach hereto a statement showing the dates and amounts of said purchases, from whom purchased, and the prices paid therefor, which statement is marked Exhibit "A," and made a part of my answer to interrogatory third. Said purchases amount in the aggregate to $48,014.84.

Int. Fourth. From whom did you purchase said bonds? Give the name or names of the persons from whom you purchased.

Answer. As I now remember I purchased the bonds from W. S. Palmer and S. M. Grubbs. Mr. Palmer, I think, was mayor of Litchfield at the time of my purchases from him, and Mr. Grubbs occupied the same position when I purchased from him.

Int. Fifth. If you shall say in answer to the last interrogatory that you purchased said bonds of some of the officers or corporate authorities of said City of Litchfield, give the name or names of such officer or officers, and state, if you know, in what capacity they, or either of them, were acting at the time of such purchases.

Answer. I have already stated that I purchased the bonds of W. S. Palmer and S. M. Grubbs, both of whom represented themselves to be mayor of the City of Litchfield at the time the negotiations took place.

89 Int. Sixth. If you shall, in answer to the last interrogatory, state that you purchased said bonds, or any of them, from the officer or officers mentioned therein, state what representations, if any, were made by said officer or officers by way of inducing you to invest your money in said securities. State fully all that was said in relation thereto.

Answer. Messrs. Palmer and Grubbs represented to me that the bonds were valid obligations of the city; that there would be no question about payment of principal and interest, and it was upon these representations I was induced to purchase. It has been so long since these transactions took place that I cannot undertake now to state just what was written or said. My general recollection is, however, that they represented the bonds to be first-class securities, free from all question as to their validity.

Int. Seventh. At the time of the purchase or purchases of said bonds state whether or not you had any knowledge from any source whatever as to their invalidity. State fully.

Answer. I had no knowledge whatever at the time of the purchases before mentioned of any vice or defect in the bonds, nor had I any knowledge thereof for a long time thereafter, and not until the city defaulted in the payment of the interest.

90 Int. Eighth. Had you or not, at the time of such purchase or purchases, any reason to believe that said securities were not valid obligations? Also state whether or not you made said purchase in good faith, believing that they were valid obligations.

Answer. I had no reason whatever to suppose, at the time of the purchases, that the bonds were not good. I made the purchases in good faith, believing that the bonds were first-class securities, and I paid nearly par for them, as will appear by my exhibit to interrogatory 3 of this deposition.

Int. Ninth. State whether or not the said city of Litchfield, or any of its officers, furnished you with the legal written opinion of Judge Anthony Thornton, of Illinois, concerning the validity of the said bonds; and, if yea, state whether that opinion was so furnished prior to your purchase or purchases.

Answer. If a written opinion was furnished me as to the validity of the bonds, I have forgotten the name of the lawyer who furnished it. All I can recollect is that Messrs. Palmer and Grubbs, as officers of the city, fully satisfied me of the validity of the bonds before I purchased them. I have no opinion of any lawyer in my possession at this time on the subject.

91 Int. Tenth. Please give the names of the several persons to whom you sold said bonds, and state whether or not they are the same persons who are made co-complainants with you in this case by amended bill. In answering this interrogatory please examine a copy of said amended bill now shown you, and also state whether the several amounts stated as belonging to said several owners are in fact correctly stated in said amended bill.

Answer. I have examined the names of the several co-complainants mentioned in the amended bill in this case. I have also had my attention called to the several bonds mentioned therein as belonging to said several co-complainants. The ownership and the several amounts stated as belonging to said owners are correctly stated in said bill.

Int. Eleventh. State as nearly as you can when you made sale of said bonds to said several co-complainants, and state what representations you made, if any, to said purchasers, as to validity or invalidity of said bonds; also state how much you received from said purchasers for the bonds so sold to them.

Answer. I cannot state with any precision when I made sale of these bonds; it was soon after their purchase, as I remember, and before there was any default in payment of the interest. I received about par and interest for them from the purchasers. I rep-

92 resented to the purchasers that the bonds were good, valid obligations of the city of Litchfield, and that they would be

paid according to their tenor and effect. This is the substance of my representations to them, but I did not guarantee the bonds to be good; I simply gave it as my opinion that they were good.

Int. Twelfth. State whether or not the several co-complainants, if you know, purchased said bonds in good faith, believing they were valid securities of said defendant.

Answer. They purchased the bonds upon my representation in good faith, believing that they were free from legal question, and paid, as I have already stated, about par and interest.

Int. Thirteenth. State whether the said defendant ever paid any interest on said bonds; if so, how often, and to whom was payment made, if you know.

Answer. I think interest was paid one and, probably, two years before default. I think the coupons were sent to me for collection by the several holders.

Int. Fourteenth. State, as nearly as you can, when the said city refused to pay interest on said bonds.

Answer. As I remember, the July coupons of 1876 were the first defaulted.

93 Int. Fifteenth. State whether or not said several bonds were placed in your hands by the said several owners thereof for collection, and also state whether or not you were authorized by them to commence this suit in your own name or otherwise. State fully.

Answer. The several holders hereinbefore stated sent the bonds to me after the city repudiated them, with instructions to commence suit in my own name. I was authorized, as their trustee, to file the original bill in this case.

Int. Sixteenth. Do you know of any other matter or thing of benefit or advantage to the plaintiff touching the matters in controversy in this cause, in addition to what you have already stated? If yea, state the same as fully as if thereto particularly interrogated.

Answer. I know of nothing further material in the case.

GEO. WM. BALLOU.

Subscribed in my presence and sworn to before me, this 20th day of December, A. D. 1882.

[L. S.] CHARLES EDGAR MILLS,
Notary Public for New York County in N. Y. City.

94 2. EXHIBIT "A" to Deposition of Geo. Wm. Ballou. [SEAL.]

Of whom bought.	Date.	Am't.	Numbers	Price.	Accrued interest.	Total.
W. S. Palmer, Mayor.	April 30, 1874	13,000	1–26 incl.	92½	429 73	12,454 73
	May 5, 1874	4,500	27–35 "	92½	154 98	4,317 48
	" 15, "	3,000	36–41 "	92½	111 67	2,886 67
	" 22, "	500	42	92½	18 33	480 83
	" 25, "	9,000	43–60 "	92½	360 00	8,685 00
S. M. Grubbs, Mayor.	July 21, 1874	4,000	91–98 "	95	22 22	3,822 22
	Aug. 5, "	5,000	61–70 "	95	48 61	4,798 61
	" 11, "	1,000	99–100 "	95	11 38	961 39
	" 25, "	1,000	71–72 "	95	15 00	965 00
	Oct. 27, "	1,000	73–74 "	95	32 22	982 22
S. M. Grubbs, Mayor, —and delivered by Holly Manufacturing Company, ac. city of Litchfield.	Jan'y 13, 1875	500	90	95	1 67	476 67
	" 16, "	2,500	85–89 "	95	10 42	2,385 42
	Feb'y 3, "	500	75	95	4 44	479 44
	" 4, "	1,500	76–78 "	95	13 75	1,438 75
	" 6, "	1,500	79–81 "	95	14 58	1,439 58
	" 19, "	1,500	82–84 "	95	15 83	1,440 83

Exhibit "A," Dec. 20, '82.

CHAS. EDGAR MILLS,
Notary Public N. Y. Co., in N. Y.

95 3. *Deposition of W. S. Palmer.*

In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

GEORGE WILLIAM BALLOU *et al. vs.* CITY OF LITCHFIELD.

Testimony on behalf of complainants taken before John A. Jones, master in chancery of said court, at his office in the city of Springfield, in said district, on Friday, the 16th day of March, 1883, in pursuance of an order of reference herein entered February 19, 1883.

Messrs. D. T. Littler and M. Hay appearing for complainants, and Messrs. Palmers, Robinson & Shutt, Stuart, Edwards & Brown for defendant.

WINFIELD SCOTT PALMER, being first duly sworn, deposes and says:

My name is Winfield Scott Palmer; reside at Litchfield, Ills.; am 63 years of age; have lived there about 28 years, and was mayor of the city of Litchfield at time of issue of water bonds. I was mayor during the years 1873 & 1874. I signed the bonds and delivered them to Mr. Grubbs, my successor. I do not know of my own knowledge whether these bonds were ever sold or what the city received for them. I negotiated for the sale of these bonds before retiring from office at from 92 to 95 cts. on the dollar with George W.
96 Ballou. That is all I think of that was done in relation to these bonds during my administration. I had nothing to do with the building of the water works.

Cross-examination:

The water works were commenced in 1873, in the fall, and during the winter we made the dam and did a good deal of other work. We paid off the most of the construction of the dam, the right of way, a good deal of it, and when we built the dam we paid Mr. Tuttle a good deal in scrip (Mr. Tuttle was the contractor who built the dam). We gave Mr. Tuttle a number of promissory notes; I don't remember the amount; that and the scrip paid him off; that is my impression. The scrip was printed in the form of a bank note, and drew interest in sums as low as $3.00, and the notes were written in the usual form of promissory note, signed by me as mayor and Mr. Hood as clerk. There were no pipes laid during my term of office. I retired about the 1st of April, 1874, at which time we had done nothing but buy the land and build the dam. I think a committee of the council bought the land; don't know how it was paid. We had a special committee appointed to build the dam and an engineer to see that Mr. Tuttle did the work right.

97 4. *Deposition of Sam'l M. Grubbs.*

SAMUEL M. GRUBBS, being first duly sworn, deposes and says:

My name is Samuel M. Grubbs, and was former mayor of Litchfield. I assumed the duties of office about April 1st, 1874, and my term of office expired one year from that time. I have heard the testimony of W. S. Palmer in this case. All of the $50,000 water bonds spoken of by Mr. Palmer in his testimony I think came into my possession. I sold a portion of these bonds to George William Ballou, according to the contract spoken of by Mr. Palmer. My opinion is I received on about $30,000 of the bonds 92½ cents in money from Mr. Ballou, and the balance of the bonds were turned over to the contractors, who agreed to take them and who got the money on the bonds from Ballou. I knew the contractors got the money from Mr. Ballou, simply because they got me to turn the bonds over to Mr. Ballou and get the money for them. I think the contractors got about 95 cts. for them. The money I received as mayor I paid into the city treasury. My recollection is it was credited to the water account. There was a special account kept by the city, called the "water fund account," during the construction of these works. This money was paid out for water works; I mean it
98 was paid out for the expenses incurred in building these water works. They were completed during my administration, and cost over $50,000. My understanding is that all the money raised from the sale of these bonds, either directly or indirectly, went into the construction of these works. No part of this money was paid out, to my knowledge, on any other account. The land was bought before I came in, and contained about thirty-eight acres. The water works consist of a large dam on the land; there is a brick engine-house there, and has the Holly machinery there for running it, boiler, &c.; there is a large main about a mile in length and a foot in diameter extending back into the city. The smaller pipes are

laid on State and other streets in the city; embrace at least a mile and a half in length, and is a six-inch pipe, and are a part of the water works system proper; there are a number of hydrants. I don't know what was the cost of the dam, but the Holly system, which embraced the engine and the right to distribute water under their rule, cost fifteen thousand dollars; their entire bill was seventeen thousand dollars, as I am informed by Mr. Palmer, my predecessor. So far as I know, the land, the engine-house, the Holly water works, the main and distributing pipes, dams, hydrants, em-
99 brace the water works, and cost the city of Litchfield over fifty thousand dollars. The water fund account was opened under Mr. Palmer's administration, and continued through mine. I don't know how the scrip and promissory notes spoken of by Mr. Palmer were paid, nor out of what fund they were paid.

Cross-examination:

I don't know positively how much money was paid out on account of these water works before I came into office. Before I came in the contracts had been made and the land bought; the dam proper was completed. There was an agreement between Mr. Ballou and me that the bonds were to be deposited by me with the Hyde and Leather Bank of Boston, to be delivered to him as he found sale for them, and the bank was to remit as paid. The money was remitted to me as mayor of the city, and by me turned over to the treasurer. The only means I have of getting at the dates of the receipt of the money is the treasurer's books. I don't know the amount of scrip and notes outstanding when I came in. The money paid to Shickle, Harrison & Co. was paid out of the water fund. I can't tell the amount; it was for the water pipes.

100 5. *Deposition of Delos Van Deusen.*

In the Circuit Court of the United States for the Southern District of Illinois.

GEORGE W. BALLOU *et al.*
vs.
CITY OF LITCHFIELD. } In Chancery.

DELOS VAN DEUSEN, being first duly sworn, deposes and says: My name is Delos Van Deusen; am 59 years old, and am city treasurer of the City of Litchfield, and was such treasurer in 1873, 1874, & 1875. I would say there was probably forty acres embraced in the City of Litchfield water-works property. I think this land was purchased in 1873; don't know positively. I don't know anything about the payment for this land, except what is shown by my book, and that don't show very clearly.

Treasurer's book of Litchfield shown in reference to the payment of this land, entry June 10, 1874, T. H. Jones' land for reservoir, $200.00; this was paid out of the water fund; the balance for the land was paid out of the general fund before the water-fund account

was opened. It appears from general fund account of treasurer's book that on April 16, 1873, there was paid V. Hoffman for land for water works the sum of twelve hundred & fifty dollars ($1,250.00), and on July 12, 1873, there was paid Jacob Beeler, on account of land for water works, $150.00, and charged in
101 the general account. On May 16, 1874, there was paid out of the water fund to Thomas H. Jones $40.00 on account of land for water works. In the first instance, all this land purchased by the city for water works was either paid out of the general fund or water fund, and all of the land was ultimately paid out of the water fund—that is to say, after the water-fund account was opened, to wit, March 22, 1875, the general fund was reimbursed the total amount taken therefrom on account of the purchase of the land and other water works expenses, by transferring from the water fund to the general fund the sum of $9,127.05, which last sum covers the total amount drawn from the general funds.

The first receipt from sale of bonds was—

May 9th, 1874		4,317 50
" 11th, "		12,454 73
" 23, "		2,886 67
June 1, "		9,167 08
July 27, "		2,866 67
Oct. 19, "		1,922 00
		$33,614 65

The water-works account was opened February 10, 1874. The books show by items the payment of $30,756.28 of the $33,614.65 received from the sale of the bonds on account of the con-
102 struction of the works. I have no doubt that the whole amount received from the sale of the bonds and more were expended on these works.

DELOS VAN DEUSEN.

Subscribed & sworn to before me April 21, 1883.

J. A. JONES,
M. C., U. S. C. C. South. Dist., Ill.

And afterwards, to wit, on Wednesday, the 30th day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-four, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Final Decree for Complainants.

GEORGE WILLIAM BALLOU, PORTSMOUTH SAVINGS Bank, Thomas B. Thayer, Peter Upton, James H. Thatcher, William F. Hallett; Azel Ames and Joel Ames, partners as A. & J. Ames; Lake Village Savings Bank, William R. Porter, Charles Jordan, Marcus Ames, Robert J. Adams, James P. Weston, Rollingsford Savings Bank, Penacook Savings Bank, Samuel F. Brown, George C. Pierce; Albert H. Nicholay and Albert H. Nicholay, Jr., partners under the firm name and style of A. H. Nicholay & Co.,

103 *vs.*

CITY OF LITCHFIELD.

} In Chancery. Original Bill.

HOLLY MANUFACTURING COMPANY *vs.* CITY OF LITCHFIELD. } Cross-Bill.

These causes came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed, as follows: First, that there is due from the city of Litchfield to the complainants in the amended bill filed herein the sum of seventy-one thousand two hundred and ninety-three dollars and ninety-six cents ($71,293.96); second, that there is due from the city of Litchfield the further sum of three thousand five hundred and forty-eight dollars ($3,548) to the complainant in said cross-bill. It is therefore ordered, adjudged, and decreed by the court that said complainants have an equitable lien upon said water-works for the satisfaction of said sums of money hereinbefore found due them from said city. Said water-works are described as follows, to wit: Commencing at N. E. corner of northwest ¼ N. W. ¼ 9, 8, 5, running thence west 25 rods and 20 links to a stone as a point of beginning; thence west on the line between sections 4 and 9. 478 feet to the east line of the Toledo, Wabash and Western railroad right of way, south on east line of said railroad right of way 172 feet to the north line of the Hillsboro and Gillespie county road, east on north line of right of way of said county road 512 feet to a stone set in the center of said county road, north 292 feet to a stone at said beginning point; also beginning
104 at the same stone and running thence N. 57° W. 327 feet to a stone on the west side of the Branch, north 83° N. 167 feet to a stone E. line of above R. R. right of way, S. on said R. R. right of way 175 feet to the sect. line, E. on sect. line 478 feet to place of beginning, being part of sections 4 and 9, 8, 5, and containing 4 acres and about one-seventh of an acre. For a greater certainty as to said described premises reference is made to a deed of warranty of same, of date of December 28, 1875, by which Robert Smith and wife conveyed the same to the city of Litchfield. Also commencing at the northwest corner of southeast one quarter of N. W. ¼ 9, 8, 5, and running thence south on the west line of said S. E. ¼ N. W. ¼

32 rods, E. 10 rods north parallel with west line of said tract 32 rods to the north line of said tract; thence running west on said north line 10 rods to place of beginning, two acres more or less. For greater certainty as to the description of said land reference is made to warranty deed, of date ——, by which Prentiss D. Cheney and wife conveyed said premises to the city of Litchfield. Also commencing at a point 10 rods east of the S. W. corner of S. E. ¼ N. W. ¼ 9, 8, 5, east on south line of said tract 30 rods north, parallel with the west line of said track, to the north line of said tract, west on said north line to a point 10 rods east of northwest corner of said quarter, south, parallel with west line of said quarter quarter, to the south line, to the place of beginning, containing 15 acres, more or less, and for greater certainty as to the above-described lands reference is made to a certain warranty
105 deed, of date January 9, 1873, by which Wm. C. Davis and wife conveyed said premises to the city of Litchfield. Also a part of west ½ northwest ¼ 9, 8, 5, Montgomery county, Illinois, beginning at the S. E. corner of northwest ¼ of section 9, running thence north with compass adjusted 5° west 275 feet to a stone set in ground, north 47° west 325 feet to a stone, W. 150 feet to a stone, north 9° 30′ west 520 feet to stone, northwesterly along south line of the Hillsboro & Gillespie public road 320 feet to a stone, south 37° east 219 feet to a stake, S. 2° E. 600 feet to a stone, south 71° east 425 feet to a stone, south to a stone 250 feet south of last mentioned stone, south 44° 30′ west 250 feet to a stone, south 23° west 392 feet to a stone, south 69 degrees west 734 feet to a stone, south 4 degrees 30 minutes west 213 feet to a stone, south 240 feet to a stone set in the ground as the quarter section corner between sections 9 and 8, east on Val. Hoffman's south line 217 feet to a stone, north 67 degrees east 659 feet to a stone, north 44 degrees east 750 feet to a stone on the division line between the east ½ and the west ½ of northwest ¼ 9, 8, 5, north on said division line 528 feet to a stone set in the ground at the place of beginning, containing 25 acres and 13,650 square feet, more or less. Also for greater certainty as to the description of said land reference is made to a certain warranty deed by which Valentine Hoffman and wife, March 24, 1873, conveyed said de-
106 scribed premises to the city of Litchfield. Also commencing at the S. W. corner of the southeast one-quarter northwest one-quarter 9, 8, 5, Montgomery county, Illinois, thence running east on south line of said tract 600 feet to a stone set in ground, north 150 feet to stone, west, parallel with the south line of said tract, 164 feet to a stone, north 705 feet to a stone set on the south line of the county road as it is now traveled, west on said south line of road 30 feet to a stone, south 705 feet to a stone, west two hundred and eighty feet to stone, north 125 feet to stone, west 125 feet to stone, south 275 feet to the place of beginning, containing 2 acres, 17,875 square feet of land, more or less. Said strip of land, 705 feet long by 30 feet wide, running north and south as described above, is to be and remain a public cartway forever. For greater certainty as to the description of said premises reference is made to a certain warranty deed of date March 25, 1873, by which Jacob Buler and

wife conveyed the same to the city of Litchfield. All of aforesaid tracts or parcels of land being located in township 8 north, range 5 west, county of Montgomery and State of Illinois, the title to which said real estate is in the city of Litchfield, and the remainder of said works consist of the water pipes, hydrants, and other appurtenances connected therewith distributed throughout the said city. It is further ordered and decreed by the court that unless the said City of Litchfield shall pay, or cause to be paid, into this court, subject to its further order, said sums of money, with six per
107 cent. per annum interest thereon from this date to the date of payment, within sixty days from this date, together with the cost of this proceeding, that complainants have leave to apply to the court for an order for the sale of the said water-works. It is further ordered that the clerk of this court retain the bonds filed herein, subject to the further order of the court.

And thereupon the defendant prayed an appeal to the Supreme Court of the United States, which is allowed upon condition that defendant execute a bond in the sum of one thousand dollars, to be approved by the clerk of this court, conditioned as provided by law, said bond to operate as a supersedeas on condition that defendant stipulate to file the record and submit the cause, under rule 20, at October term of said Court, 1884.

And afterwards, to wit, on the 23rd day of September, in the year last aforesaid, came the defendants in said foregoing entitled cause and filed in the clerk's office of said court its appeal bond, which said bond is in the words and figures as follows, to wit:

Appeal Bond.

In the Circuit Court of the United States for the Southern District of Illinois.

GEORGE WILLIAM BALLOU, PORTSMOUTH SAVINGS Bank, Thomas B. Thayer, Peter Upton, James H. Thatcher, William F. Hallett; Azel Ames
108 & Joel Ames, partners as A. & J. Ames; Lake Village Savings Bank, William R. Porter, Charles Jordon, Marcus Ames, Robert J. Adams, James P. Weston, Rollingsford Savings Bank, Penacook Savings Bank, Samuel F. Brown, George C. Pierce; Albert H. Nicholay and Albert H. Nicholay, Jr., partners under the firm name and style of A. H. Nicholay & Co.,	No. 6099. Original Bill. In Chancery.
vs. CITY OF LITCHFIELD.	
and	
HOLLY MANUFACTURING COMPANY *vs.* CITY OF LITCHFIELD.	Cross-Bill.

Know all men by these presents, that we, The City of Litchfield

(Illinois), as principal, and Julius C. Machler, Wm. Concidine, J. F. Blackweler, S. J. Hunter, Wm. Barefoot, Wm. Wilton, John Lange, Jno. M. Rose, E. R. Davis, and George L. Zink, of Litchfield, in the county of Montgomery and State of Illinois, as sureties, are held and firmly bound unto the said George William Ballou and others, complainants in the original bill above named, in the sum of one thousand dollars ($1,000.00), lawful money of the United States of America, to be paid to the said George William Ballou and others, their heirs, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, firmly by these presents.

109 Sealed with our seals, and dated this fourth day of September, A. D. 1884.

Whereas the above-named The City of Litchfield has prayed for and obtained an appeal to the Supreme Court of the United States to reverse the final decree rendered in favor of the complainants in the above-entitled cause, on the 30th day of July, A. D. 1884, by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of the above obligation is such, that if the above-named The City of Litchfield shall prosecute its said appeal with effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LITCHFIELD,
By JOHN LANGE, *Mayor.* [SEAL.]

Attest: JNO. N. ROSE,
City Clerk.

JULIUS C. MACHLER. [SEAL.]
WM. CONCIDINE. [SEAL.]
J. F. BLACKWELER. [SEAL.]
S. J. HUNTER. [SEAL.]
WM. BAREFOOT. [SEAL.]
WM. WILTON. [SEAL.]
JOHN LANGE. [SEAL.]
JOHN M. ROSE. [SEAL.]
E. R. DAVIS. [SEAL.]
GEORGE L. ZINK. [SEAL.]

Signed, sealed, and delivered in presence of—

_____ _____.

Approved.
S. H. TREAT,
District Judge.

(Endorsed:) Filed September 23, A. D. 1884. J. A. Jones, clerk.

110 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Southern District of Illinois, } *ss:*

In the Circuit Court for said District.

I, John A. Jones, clerk of the circuit court of the United States within and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and the proceedings thereon had in a certain cause lately pending in said court, wherein George William Ballou, Portsmouth Savings Bank, Thomas B. Thayer, Peter Upton, James H. Thatcher, William F. Hallett; Azel Ames and Joel Ames, partners as A. & J. Ames; Lake Village Savings Bank, William R. Porter, Charles Jordan, Marcus Ames, Robert J. Adams, James P. Weston, Rollingsford Savings Bank, Penacook Savings Bank, Samuel F. Brown, George C. Pierce; Albert H. Nicholay and Albert H. Nicholay, Jr., partners under the firm name and style of A. H. Nicholay & Co., are complainants, and The City of Litchfield (Illinois) is defendant in the original and amended bill, and The Holly Manufacturing Company is complainant and The City of Litchfield is defendant in the cross-bill, as fully as the same appear on file and of record in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield,
111 in said district, this 8th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and ninth year.

[SEAL.] J. A. JONES, *Clerk.*

Endorsed on cover: S. Illinois C. C. U. S. No. 1180. The City of Litchfield, appellant, *vs.* George William Ballou, The Portsmouth Savings Bank, *et al.* Filed 27th October, 1884.

114-190

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1884.

THE CITY OF LITCHFIELD, *Appellant*,

vs.

GEORGE WM. BALLOU, ET AL, *Appellees*.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF THE CASE AND

BRIEF AND ARGUMENT

OF

JOHN M. PALMER and B. S. EDWARDS,

for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1884.

THE CITY OF LITCHFIELD, *Appellant*,

vs.

GEORGE WM. BALLOU, ET AL, *Appellees*,

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF THE CASE.

The City of Litchfield, the appellant, is a municipal corporation organized under an act of the General Assembly of the State of Illinois, approved February 16, 1859.

The Constitution of the State of Illinois contains a provision which was in force August 8, 1870, as follows:

ARTICLE IX.

SECTION 12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness."

The General Assembly of the State of Illinois on April 15, 1873, passed an act entitled "An act authorizing cities, in incorporated towns and villages, to construct and maintain water works:" the material provisions of which are as follows:

"SECTION 1. That all cities, incorporated towns and villages in this State be and are hereby authorized, and shall have power to provide for a supply of water for the purposes of fire protection, and for the use of the inhabitants of such cities, incorporated towns or villages, by the erection, construction and maintaining a system of water works. * * *

SECTION 2. Such cities, incorporated towns and villages may borrow money, levy and collect a general tax in the same manner as other municipal taxes may be levied and collected for the erection, construction and maintaining of such water works, and appropriate money for the same."

SECTION 3. For the purpose of erecting, constructing, locating, maintaining or supplying such water works, any such city, incorporated town or village may go beyond its territorial limits, and may take, hold and acquire property and real estate, by purchase or otherwise; and shall also have the power to take, hold, acquire and condemn any and all necessary property and real estate for the location, erection, construction and maintaining of such water works, in the manner provided for the taking and condemning of

private property for public use; and may also acquire and hold real estate and other property and rights necessary for the location, erection, construction and maintainance of such water works by purchase or otherwise; and the jurisdiction of such city, town or village to prevent or punish any pollution or injury to the stream or source of water for the supply of such water works, shall extend ten miles beyond its corporate limits.

SECTION 4. The common council of such cities, or trustees of such towns or villages, shall have power to make and enforce all needful rules and regulations in the erection, construction and management of such water works, and for the use of water supplied by the same. And such cities, towns and villages shall have the right and power to tax, assess and collect from the inhabitants thereof such tax rent or rates for the use and benefit of water used or supplied to them by such water works, as the common council or board of trustees, as the case may be, shall deem just and expedient. And all such water taxes, rates or rents shall be a lien upon the premises and real estate, upon or for which the same is used or supplied. And such taxes, rents or rates shall be paid and collected, and such lien enforced, in such manner as the common council shall, by ordinance, direct and provide.

SECTION 5. The expense of locating, erecting and constructing reservoirs and hydrants for the purpose of fire protection, and the expense of constructing and laying

water main pipes, or such parts thereof as may be just and lawful, may be assessed upon and collected from the property and real estate specially benefited thereby, if any, in such manner as may be provided for making of special assessments for other public improvements in such cities, towns or villages.

SECTION 6. All the income received by such cities, towns or villages from such water works, from the payment and collection of water taxes, rents or rates shall be kept in a separate fund, and shall first be applied in the payment and discharge of the costs, interest on bonds or money borrowed and used in the erection and construction of such water works and running expenses thereof. And any surplus may be applied in such manner as the Common Council or the Board of Trustees may direct.

On December 4, 1873, the City of Litchfield, by its Council, passed an ordinance authorizing the issue of its bonds to the amount of fifty thousand dollars, for the purpose of constructing water works, according to the provisions of the before mentioned law.

Bonds to that amount were accordingly issued and sold to one George William Ballou and others, the city realizing therefrom the sum of $48,014.87. The date of his first purchase was April 30, 1874, and of the last purchase was February 19, 1875.

The city having failed to pay the interest maturing July 1, 1876, on November 28, 1876, one Alexander

Buchanan commenced an action of assumpsit in the Circuit Court of the United States for the Southern District of Illinois, for the recovery of the amount of certain of the coupons detached from the bonds, the declaration containing a special count upon the coupons, also the common or money counts, including that for money had and received.

This action resulted in a judgment for the city, and upon a writ of error to this court that judgment was affirmed.

See Buchanan vs. Litchfield 102 U. S. 278.

On March 15, 1881, George Wm. Ballou, one of the appellees in this case, filed his bill in equity on behalf of himself and others who might come in, etc., setting up the act of the Legislature and the ordinance of the city of Litchfield before mentioned, the issue of the bonds, and the sale of the whole amount of them, $50,000, to him for $48,014.87, and makes the proceedings in the case of Buchanan vs. The City of Litchfield in the Circuit and Supreme Courts a part of his bill.

He then charges that with the money arising from the sale of the bonds the city, by its proper authorities, proceeded to construct a system of water works, consisting chiefly of buildings and the necessary machinery to supply said city with water, located on certain lands, the title to which is in the city. The remainder of the works consist of the water pipes, hydrants and appurtenances

connected therewith distributed throughout the city.

But the city denies all liability to pay the said bonds, or to refund the money so advanced for the construction of the works and refuses to do so.

The bill then prays,

1. A Receiver of the works *pendente lite*.

2. An account of the money paid by Complainant and others, with six per cent. interest from date of payment and decree for same.

3. A specific lien upon the water works.

4. A sale of the water works, and a decree over for any balance, to be paid by taxation.

5. And for general relief.

A demurrer to this Bill for want of equity was interposed, but was over-ruled.

On August 23, 1882, the Portsmouth Savings Bank, and some sixteen other persons and corporations, came into the suit by amendment to the Bill, alleging themselves to be the holders of certain of the bonds respectively in certain amounts specified.

That they had bought the bonds from Ballou before maturity, on representations that they were the binding obligations of the city, and that they paid full value therefor, without knowledge of any defects therein.

That they had authorized Ballou to file the original Bill in his own name as their trustee, but were now advised that they could better assert their rights by prosecuting the suit in their own names.

They adopt the statement of facts, and the prayer of the original bill, and make the Holly Manufacturing Company partly defendant.

The Holly Manufacturing Co. filed an answer and a cross bill containing the same allegations of fact, the cross bill praying for affirmative relief, that is, to share *pro rata* with the Complainants in the proceeds of any decree which might be made. These allegations are

1. That on the 23d day of March, 1874, it made a certain agreement in writing with the city of Litchfield, in and by which agreement respondent agreed to furnish divers materials, machinery, etc., for the water-works in the original bill mentioned, and to do and perform certain labor and service in and about the construction of said water-works and the placing of said machinery, for all of which the said city by the said agreement in writing, promised to pay respondent $15,000. That by a certain clause of said agreement, the city reserved an option until the 1st day of June then next following, to pay $3,000 of said sum of $15,000, in the treasury warrants of said city, which said warrants were to be payable in one, two and three years from the date of the completion of the machinery, etc., in

said written agreement described, with ten per cent. interest, payable semi-annually.

2. That in pursuance of said written agreement respondent furnished all the material and machinery, and performed all the labor and service in the manner and within the time prescribed, to the entire satisfaction of said city, and in short, fully kept and performed all the provisions of said agreement. That the city received the labor and materials, etc., and paid the stipulated price except the amount of certain warrants particularly described. That the warrants represent the balance of the purchase money for the material, labor, etc., furnished under the contract. That the city refuses to pay the amount of the warrants, and denies all liability to do so, upon the ground of a want of power in the city to issue them. It offers to surrender the warrants, and asks to share in the proceeds of the decree.

The City of Litchfield answered both the amended Bill and the Cross Bill in substance as follows:

1. Admits the issue of the pretended water-works bonds, the sale of the same to Ballou, the receipt by the city officers of $48,014.87, paid by him for the $50,000, at the times and in the amounts specified in the bill.

2. Admits the proceedings in the case of Buchanan vs. The City of Litchfield, in the Circuit and Supreme Court of the United States, as alleged in the bill.

3. Denies all representations by the officers of the city as to the validity of the bonds, and insists that such representations were opinions upon matters of law, which could not affect the city; and applies the same denial to all statements of the reliance of Ballou, or any of the holders of the bonds, upon such representations.

4. Sets up the constitutional provision above referred to, and the indebtedness existing at the time of the issue of the bonds, in excess of five per centum upon the value of taxable property in the city, as ascertained by the last assessment for state and county taxes previous to incurring the indebtedness. The assessed valuation being $1,400.000, and the indebtedness being $70,000. Therefore denies that the city was capable in either law or equity of becoming indebted in any further sum, either by the issue of bonds, or receipt of money by its officers, or otherwise.

5. Denies any transactions with any of the complainants except Ballou, and denies any obligations to them.

6. The Statute of Limitations, of five years.

7. That the complainants' remedy is adequate at law, and prays the same benefit thereof as if a demurrer had been interposed.

Replications were filed, and evidence taken, which, with record of the proceedings in the suit between Buchanan

and The City of Litchfield before referred to, leaves substantially no disputed questions of fact between the parties.

On the hearing the court entered a decree as follows:

First. That there is due from the City of Litchfield to the complainants in the amended bill filed herein the sum of $71,293.96.

Second. That there is due from the City of Litchfield the further sum of $3,548 to the complainant in said cross bill.

Third. That said complainants have an equitable lien upon said water works for the satisfaction of said sums of money herein found due them from said city.

Fourth. That unless the said city of Litchfield shall pay or cause to be paid into this court subject to its further order, said sums of money, with 6 per cent. per annum thereon from this date, to the date of payment, together with the costs of this proceeding, that complainants have leave to apply to the court for an order for the sale of said water works. That the clerk of this court retain the bonds filed herein, subject to the further order of the court.

The defendant, City, brings the cause to this court by appeal, and assigns and specifies errors in the decree of the court below, as follows:

1. The court below erred, in finding and adjudging any sum of money to be due from the appellant to the appellees.

2. The court below erred, in declaring an equitable lien in favor of the appellees, upon the water works in the proceedings mentioned, for the satisfaction of the sums of money in the said decree found due from appellant to appellees.

3. The court below erred, in requiring the appellant to pay into court the sums of money found due from appellant to the appellees, with interest in sixty days from the rendition of the decree, and in rendering a decree against appellees for costs.

BRIEF AND ARGUMENT

OF

JOHN M. PALMER and B. S. EDWARDS,

for Appellant.

In view of the fact that the general subject of this litigation has been considered by this court, and certain rulings made which, so far as they apply, are decisive of this case, it will be proper briefly to enquire, what new facts are now before the court, and in what respects, aside from the mere change of the forum from a court of law to a court of equity, the status of the litigation has been changed.

In Buchanan vs. Litchfield, 102 U. S. 278, the facts before the court were:

1. The issue and sale of $50,000 of Water Bonds, by the City of Litchfield, under the supposed authority of the Act of the Legislature of Illinois, of April 15, 1873.

2. That at the time of the issue of the bonds, the city was indebted in excess of the limit prescribed by the Constitution of Illinois.

The law was declared to be, that the City of Litchfield did not, by reason of these facts, become indebted to any one. The legal reason, which is a part of the law, was thus stated by the court:

"The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority, therefore, conferred by the act of April 15, 1873, to incur indebtedness in the construction and maintenance of a system of water works, could be lawfully exercised by a city, incorporated town or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebteness which the con-

stitution expressly declared it should not be allowed to incur."

Not immediately connected with the facts and law of that case, but important as possibly suggesting the present suit, Mr. Justice Harlan, after disposing of the questions involved in the record, said, *obiter:*

"Whether the city is under a legal obligation to make restitution of the money, obtained without authority of law, that is, to refund to the proper party or parties such sums as were actually received by its authorized agents or officers upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds. Upon this point it is not proper at this time, or in this form of action, to express an opinion."

Giving, however, to the Appellees the benefit of any argument which they may fairly urge, arising even from a doubt suggested from such an authoritative source, it must be borne in mind, that the language quoted was preceded by the undoubting statement of a principle which will ultimately control the decision of this case, and which principle it is the purpose of this argument to apply.

The Court then says: "Our attention is called by Counsel to the exceeding hardship of this case upon those whose money, it is alleged, has supplied the City of Litchfield with a system of water-works, the benefits of which

are daily enjoyed by its inhabitants. The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases."

Those interested in the pretended water bonds, still complaining of the hardship of their "special case," change the forum to a court of equity, where the following new facts appear:

1. The payment by Ballou to the officers of the city, the sum of $48,014.87, upon the purchase of the water bonds.

2. The receipt of that sum into the city treasury, and its use in the payment of debts previously contracted in the purchase of land, the purchase of materials, and the payment for labor connected with the construction of a system of water-works.

3. The sale by Ballou of the water bonds to his co-complainants in the amended bill, and the receipt by him of the full nominal value of the bonds, in money, and—

4. Those facts which relate to the rights of The Holly Manufacturing Company, the Complainant in the cross-bill.

Those facts are new, only in the sense that they continue the history of the construction of the Litchfield

water-works up to the time of filing the amended bill, upon which the decree appealed from is based. They do not even illustrate the hardship of the special case supposed by the Court, further than the Court then had it in contemplation, and certainly can have no effect upon the *ratio decidendi* in Buchanan's case.

It must be conceded that none of the facts which are thus added to the history of the water-works, have any influence upon the power or capacity of the City of Litchfield to incur a debt, or, in the language of the constitution, "to become indebted," on account of the construction and maintainance of a system of water-works.

The Court below, however, sitting in chancery upon all the facts, old as well as new, has, in the decree appealed from, adjudged:

1. That the City of Litchfield *is indebted*, on account of the construction of the water-works, in the aggregate sum of $74,841.96.

2. That an equitable lien exists in favor of the purchasers of the water bonds, upon the water-works property, for the satisfaction of such indebtedness.

The subject of this litigation now, again, comes before this Court, and the first question to be considered under the law and the pleadings, as well as the facts in this case is.

Can a court of equity adjudge the existence of a debt

when a court of law, upon the same facts, has adjudged that no such debt exists.

It may well be admitted that a court of equity will grant relief, where no relief can be given at law; but this will be found due rather to the flexibility of its remedial process, and its adaptability to particular cases, than from any difference between the rules which govern the two courts, in the determination of the obligations of the parties.

Indeed, it is difficult to imagine a case of an obligation to pay money, which would not be declared and enforced in an action at law for money had and received; the governing principle in such action being, that the plaintiff shall recover when the defendant has obtained money, which, in equity and good conscience, he ought not retain from the plaintiff.

The doctrine of this court is thus stated: "The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as that of a court of law. It cannot exercise jurisdiction when there is an adequate and ample remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations."

In view of this principle let us see what has been done in this litigation.

This court in an action at law, upon a declaration containing, as we have seen, a count for money had and received, determined that the City of Litchfield did *not* "become indebted in any manner or for any purpose;" while the court below in the decree appealed from determines upon the same facts, that the city *is* so indebted, for thus we understand the first clause of the decree, which is that "there is due from the city of Litchfield to the complainants in the amended bill, the sum of $71,293.96." *

The city therefore in view of all the facts of the case, and that all that any court could do, would be to establish an indebtedness: attempted in apt time and in due form, to avail itself of the defense that the remedy of the holders of the water bonds was adequate at law, and that therefore a court of equity had no jurisdiction. To that point we will now briefly devote our attention.

I.

THE REMEDY OF THE APPELLEES, IF ANY EXISTS, IS ADEQUATE AT LAW.

Leaving out of consideration the effect of the constitutional provision referred to in the pleadings, the prohibitions of which we assume would be as effectual in a court of equity as in a court of law, the transaction be-

* This amount includes interest, which of course could not be allowed in any event, unless the Court is prepared to affirm the void Contract.

tween Ballou, the complainant in the original bill, and the city, treating it in the aspect most favorable to him, was a mere loan of money, for which an action of assumpsit for money lent, or money had and received would lie.

Louisiana v. Wood 102 U. S. 294.

The complainants in the amended bill, the purchasers of the water bonds from Ballou, are simply assignees of a chose in action, and are in no better or different position than Ballou would have been; as matter of form they would, if they had sued at law, been compelled to use the name of Ballou, but "The mere fact that an assignee of a chose in action can not sue at law in his own name, to enforce for his own use the legal right of his assignor, does not authorize him to proceed by bill in equity.

Hayward v. Andrews, 106 U. S. 675.

New York, etc. v. Memphis Water Co. 107 U. S. 205.

There is here no equitable fact or circumstance to take this case out of the operation of this rule; there is no allegation of a refusal on the part of Ballou to permit the use of his name in an action at law. On the contrary, the evidence shows that after the default in the payment of the interest, the several holders of the bonds sent them to Ballou, with instructions to him to institute suit in his own name,—Printed Record page 44, and the original bill in the case is the result of such instructions.

Other cases might be cited in support of this proposition, but it seems to us that these decisions, taken in connection with Section 723 of the Revised Statutes of the United States, which provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law," should be conclusive upon this court.

Section 723 which was a part of the judiciary act of 1789, has been regarded as only declaratory of that which was the rule in courts of equity before; but as suggested in one of the cases above mentioned, it is emphasized in the jurisprudence of the United States, and its courts will see that it is observed of their own motion, whenever it appears that there is a remedy at law.

So far as this defence, and this branch of the decree of the Court below is concerned, the case is very much like Parkersburg v. Brown, 106 U. S., upon which for some purposes the appellees will rely, where the Court say, at page 500, "The relief granted by the decree was a simple money judgment against the city for the interest due on the bonds at the date of the decree, based upon the legal liability of the city to pay the bonds and coupons. For this there was a plain, adequate and complete remedy at law, in each bond-holder, if the city was thus liable. So that the decree made could not be sustained in any event.'

So it is in this case, if any *indebtedness* exists arising from the facts, such facts would sustain an action for

money lent or money had and received. If the city could have became indebted to the appellees in any manner or for any purpose, such indebtedness created a liability at law, as well as in equity; and the query of Mr. Justice Harlan:—"Whether the city is under a legal obligation to make restitution of the money obtained, without authority of law," could as well be answered at law as in this proceeding—for the expression "legal obligation" clearly indicates what the learned Judge had in his mind.

II.

THE STATUTE OF LIMITATIONS OF FIVE YEARS.

The Appellant, treating the transaction between Ballou and the City as a mere loan of money, relying upon "the settled principles of law," and disregarding the supposed hardships of the case of the Appellees, interposed the Statute of Limitations as a bar to any relief. The last purchase of bonds made by Ballou was on February 19, 1875, the original bill was filed March 15, 1881. As to Ballou, the full period of five years had elapsed before the commencement of this suit.

But it is apparent that he has no interest in this litigation, either formal or substantial. He loaned his money to the city—or he bought the bonds of the city—but he has been more than reimbursed for the amount of his advances. He received of the other appellees the nominal value of the bonds, with the accrued interest. As to the

other Appellees, they assert their rights for the first time on August 23, 1882, when the amended bill was filed.

The Illinois Statute of Limitations is as follows:

"SECTION 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute:

"SECTION 15. Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

Statutes of limitation in their terms are confined to actions at law, but courts of equity consider themselves within their spirit and meaning. Hence it is an established rule that where the statute bars the legal remedy it shall bar the equitable remedy in analagous cases, or in reference to the same subject matter, and where the legal and equitable claims so far correspond, that the only difference is that the one remedy may be enforced in a court of law and the other in a court of equity.

Perkins v. Cartmell, 4 Harrington 270.

S. C. 42 Am. Decisions 753.

Hancock v. Harper, 86 Ill. 445.

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Frame v. Kenney, 2 A. K. Marshall 145.

S. C. 12, Am. Decisions 367.

A case for the application of the statute of limitations in equity, could not be more clearly made than the one at bar. The appellees upon their own showing come into a court of equity, solely because they assert that the *remedy* is in that court, not because the obligations of the defendant could not be asserted at law. The Statute begins to run whenever the Creditor could bring an action.

3 Parsons, Contracts 92.

The question arises, when did "the cause of action accrue?" If the right results from a delivery of money to the officers of the city and the obligation to return it, then the cause of action accrued certainly not later than February 19, 1875.

If the right to recovery is based upon the investment of the money in the water works, then as soon as such investment was made, the bill could have been filed, or the action for money had and received commenced.

According to all the testimony, the works were completed and paid for in 1874.

If the pretended bonds can be used for the purpose of determining the time of payment, and thus make the time when the cause of action accrued, depend upon their terms, then this bill is premature, as the time fixed by the

bonds for their payment is twenty years from their date in 1873.

But such a position is not tenable. In Chapman v. Douglass County, 107 U. S. 358, where the court had determined that certain notes issued by the county were invalid, the court say: "The original right of action was not postponed by reason of the credit given, as shown by the invalid notes."

The circumstance that the appellees have resorted to a court of equity for the assertion of equitable lien, was supposed upon argument in the court below, to have some effect upon the operation of the statute of limitation, but it is a familiar rule that where the debt, which is the principal thing, is barred, the lien, which is but the mere incident, is barred.

Thus, where an action at law upon a note is barred by the statute of limitation, no foreclosure in equity can be had of a mortgage to secure its payment,

March v. Mayers, 85 Ill. 177.

and so of the lien of an unpaid vendor of real estate for the purchase money; where the debt is barred no lien can exist which can be enforced.

Ilett v. Collins 103 Ill. 74.

It will no doubt be insisted that the city, having received the money of the appellees without right, and

applied it to its own use, is to be treated in equity as a trustee, and hence can not avail of the statute of limitation.

The rule upon this subject, sustained by an overwhelming array of authorities, may be thus stated: The trusts intended by the courts of equity not to be reached or affected by the statute of limitation, are those technical and continuing trusts which are not cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court.

Frame v. Kenney, 12 Am. Decisions 373, note.

Kane v. Bloodgood 7, Johnson Ch. 90.

But it is simply begging the question to say that a trust exists in this case. The transaction was intended by the parties to be a mere loan of money, and unless some principle can be found to justify the position that a contract, which if lawful, only creates a debt, will, if forbidden by law, create a trust, the argument of appellees goes for nothing.

Regarding then the mere moral duty to return the money as creating a trust, if such a statement can be properly made under any circumstances, this moral duty existed in 1875, when the money was received, and a court of law has been since that time competent to administer relief. Under the authorities referred to, which are but illustrative of the whole current of authority, no such trust exists in

this case, as would prevent the operation of the bar of the statute of limitation.

Governor v. Woodworth, 63 Ill. 254.

Hayward v. Gunn, 82 Ill. 385.

III.

THE COURT BELOW HAD NO POWER TO DECLARE AN EQUITABLE LIEN UPON THE WATER WORKS PROPERTY.

Recurring to our proposition that the decree appealed from, to the extent that it finds an amount due from the city of Litchfield to the appellees is erroneous, we will no doubt be met by the theory of the appellees, that the finding of the amount due is merely inducement to, and a limit to that portion of the decree which declares an equitable lien upon the water works property in favor of the appellees.

Without venturing an opinion as to whether that is the true construction of the decree, with the suggestion that to so construe it, is to reverse that general rule, which regards the debt as the principle thing, and the lien the mere incident. We will endeavor to show that with such construction the decree is erroneous.

To determine whether in a given case a court of chancery can declare an equitable lien, it is necessary not only to ascertain the equitable rights of the complainants, but also the powers and capacities of the defendants; and where,

as in this case, the property against which a lien is sought to be enforced possesses a peculiar character, the legal status of such property.

The settled rule of this Court is, "That a city is only a political sub-division of the state, made for the convenient administration of the government. It is an instrumentality with powers more or less enlarged, according to the requirements of the public, and which may be increased at the will of the legislature."

Per Field J., New Orleans v. Clark, 95 U. S., 654. And while it has been recognized that cities may make contracts, and sue and be sued in like manner, to a limited extent, as private corporations; this is permitted only in pursuance of some statute, or, perhaps, in accordance with some rule of the common law, which is as well defined, and and has the force of a statute.

This Court, which has gone as far, perhaps, as any court in enforcing the contract obligations of cities, has never deviated from the doctrine, early established, that statutory authority must always be shown to warrant judicial action against them.

And this Court, while by its judgments declaring the rights of creditors of cities, has steadily refused to interfere in their governmental affairs, or to permit its process to be used to obtain satisfaction of such judgments, otherwise than to compel the exercise of statutory powers.

Rees v. Watertown, 19 Wallace, 107.

New Orleans v. Morris, 105 U. S., 600.

This Court has been equally careful to refuse to interfere with the physical agencies entrusted by the state to cities, to be used to accomplish governmental purposes, in furtherance of the policy of the state.

In New Orleans v. Morris, *supra*, the Court recognized the doctrine that the property of municipal corporations created for governmental purposes, can not be taken for the payment of a corporate debt. And apply the rule to water-works property, under circumstances where the equities of the creditors were as persuasive as those of the Appellees here.

In that case the bonds, the collection of which was sought to be enforced, "were issued by the city while sole owner of the water-works, in aid of their construction and extension." 105 U. S., 601.

The Court then say: "We think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity, that they were held in trust for the use of the citizens. In this respect they were the same as public parks and buildings, and were not liable to be taken in execution for ordinary debts against the city."

The reason of this rule is found in the policy of the

State, which, while regarding the rights of creditors, also considers, in a higher degree, the rights of the public, for which the city is only regarded as a trustee.

An examination of the law under which the Legislature of Illinois has authorized cities to construct or acacquire water works, as well as the agencies by which such works are to be controlled and their benefits secured, the physical character of the works, and their connection with other property over which the city exercises governmental control, demonstrates that such works are not capable of any other than public use.

The power under which cities erect such works is governmental—to be exercised by the legislative authority of the city. The purpose is public, "to provide for a supply of water for the purposes of fire protection, and for the use of the inhabitants of such cities."—Sec. 1, Act 1873.

The method of obtaining property for the purpose of providing water supply, contemplates the exercise of the right of eminent domain; and the authority given for the protection of such works, and to prevent pollution of the source of water supply, requires the exercise of the legislative authority of the city.—Sec. 3, Act 1873.

The use and management of the works, the apportionment of charges for water supplied by the works, is entrusted to the legislative authority of the city, to be ex-

ercised in such manner as that authority shall deem expedient. Such charges, which may well be supposed to be the principle sources of revenue, are made a lien upon the property of individuals, "to be paid, collected, and such lien enforced in such manner as the common council shall, by ordinance, direct and provide."—Sec. 4, Act 1873.

The physical character of the property, as described in the evidence, shows that it is intimately connected and blended with the other municipal property, or property over which the city exercises governmental control, as distinguished from that which it might exercise as mere owner.

"The water works consist of a large dam on the land, a brick engine house, and has the Holly machinery there for running it, boiler, etc. There is a large main about a mile and a half in length, and a foot in diameter, extending back into the city. The smaller pipes are laid on State and other streets, at least a mile and half in extent, six-inch pipe, and are part of the Water Works system proper. There are a number of hydrants; don't know what was the cost of the dam, but the Holly system, which embraced the engine, and the right to distribute water under their rule, cost $15,000."

See testimony of Samuel Grubb—*Printed Record, page* 46.

Indeed, it seems that it has practically no value except as it may be used by the City of Litchfield, and such use involves the occupation of its streets, over which the city, as a governmental agency has sole control.

No case, it seems to us, can be imagined of property more completely devoted to public use than the Water Works of the City of Litchfield, and no case demands in a higher degree the protection of the rule that forbids judicial interference with such property.

But the rule of exemption of this property from judicial seizure for the payment of debts, or for the enforcement of equitable obligations, is based upon the further consideration, which applies with justice to all persons dealing with municipal corporations, and that is, that persons dealing with such bodies do not rely upon the seizure of such property for the payment of debts of any character.

The primary, and perhaps the only means which a city has for discharging its obligations, is by a resort to taxation—either general or special—and this rule is of such universal application that in many cases in this court it has heen held, that the right to tax, must exist as a condition precedent to the right to incur a debt.

Loan Association v. Topeka, 20 Wallace, 660.

The mechanic and material man knows that such property is not subject to the statutory lien of mechanics;

and though his labor and materials go into the propety, he does not look to it for payment.

There can therefore be no propriety in urging as a hardship to those dealing with cities, that property upon which they placed no reliance for the payment of their claims should be exempt from judicial interference.

Assuming then that the property in question is not liable for the payment of debts incurred in pursuance of law, is there anything in the fact that the appellees were parties to a transaction forbidden by law, which would change the status of this property, or give to the court greater power to divert it from the public use to which it has been devoted?

The general rule is, that the court will not aid parties to a transaction forbidden by law, but will leave them where they have chosen to place themselves.

Distinctions have been made between transactions involving moral turpitude, and those which are simply prohibited, the prohibition not being grounded upon moral considerations.

Penn vs. Bornman. 102 Ill., 523.
Workingmans' Bank vs. Rautenberg, 103 Ill., 460.

In some of the cases distinctions are suggested, based upon the difference in the degree of guilt, or innocence of the respective parties to the illegal transaction and some-

times parties to forbidden contracts have been relieved, as it is said, in disaffirmance of such contract.

But none of these cases can have any application here. In every case where relief has been granted to either party to such a contract, it will be found that such parties had the capacity to contract in respect to the subject matter, but that some form of law had been omitted or violated, and the legal obligation resting upon parties who have the legal capacity to do justice, has in these cases been inforced.

In this case, however, the city of Litchfield has not the power to do that which might be considered abstract justice, that is, return the money.

It has no money in its treasury; the limit of its taxing power has been reached; and, in short, if it had the disposition to do all that the purest system of morals would indicate as proper, it could not do so.

It could not, if it would, sell the water-works property and pay over the proceeds to the appellees; it could not convey the property to the appellees in satisfaction of their lien, and if the appellees should sell the property, it could not redeem from such sale.

It will thus be seen that whatever may be the rule in reference to contracts forbidden by law, and whatever may be the exceptions to that rule, the appellees are not aided.

But after all that has been said, and after every appeal to legal and equitable analogies is exhausted, the appellees are only seeking to be relieved against their own mistake of the law.

They purchased the commercial paper of the city of Litchfield, relying upon the power of the city to issue such paper. Or, in view of certain decisions of this court, to be hereafter noted, they purchased the evidences of indebtedness of the city, which indebtedness the city had no power to incur.

The value of the thing purchased depended upon a matter of law, that is the power of the city to issue the bonds and especially to incur the debt, of which the paper was the mere evidence.

In all discussions of the question whether a mistake of law can be relieved against, it will be found that the party paying the money was supposed, or alleged that he paid, under a misapprehension of his legal duty or liability.

Here there is no such question. The appellees purchased bonds of the city of Litchfield, the value of these bonds depended exclusively upon the power of the city to issue them. They obtained the thing purchased, but that thing was not effectual to secure their reimbursement.

It was a mere speculation. If the bonds were valid

they secure their money and interest at a rate supposably in advance of the market rate for money. If the bonds are invalid, they must resort to such remedies for the money invested as the law has provided.

Since the case of Rousmaniere v. Hunt, which was before this court in a variety of forms, half a century ago, it has been regarded as a settled law, that if a party advances his money upon security which fails, for legal reasons, to give him the advantage desired, he can not be relieved. And without considering all the cases upon this subject, we think it enough to say that when the appellees purchased the bonds they took the chances, and under such circumstances no court, especially a court of equity, will relieve them.

It has been suggested that a trust was created by the investment of the moneys advanced by Ballou in the construction of the water works. But we appeal to the settled principles of law, and inquire when has it been held that the loan of money, which creates no debt, can be the foundation of a trust.

To declare a trust, or a lien, which implies the right to deprive the city of all means of fire protection, would be simply to enforce for the benefit of creditors, a species of moral coercion which has no sanction in the decisions of any court.

It would be simply to say, that although there is no

legal obligation to pay, yet a court of equity will take the public property, deprive it of its public character, give it to individuals, and allow them to compel the citizens to treat with them for fire protection, or be deprived of it, and this solely upon the ground that there is no remedy at law. But this Court, fortunately for every interest involved in the case, has decided that no such power exists in a court of equity.

"A court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law, or even without authority of law. It acts upon established principles not only, but through established channels.

Rees v. Watertown, 19 Wallace, 122.

We might well submit this case upon the views already suggested, but as this case is submitted under the short rule, and no occasion for a reply to such arguments as may be made by counsel for appellees will arise, we will briefly refer to two cases decided in this court, which were thought by appellees' counsel in the court below to have some application to the case above.

The first case is Parkersburg v. Brown, 106 U. S., 487. That case was one where the bonds out of which the claim of the complainant arose were declared invalid; but the court expressly declining to treat the city as trustee, allowed a creditor of a private person, to reclaim

property which had been specially pledged to pay amounts of money due.

The court in that case refused to declare any obligation upon the city, either legal or equitable, on account of bonds issued in violation of law.

In that case the property reached by the decree was not stamped with a public use; on the contrary, it was such property as could be reached by the ordinary process of execution upon a judgment at law.

The case of Chapman vs Douglass County, 107, U. S., 348, was decided upon principles heretofore adverted to, and the result of the decision is correctly stated in the Reporter's *Head Notes*, as follows: "*Held*, That * * * the contract being unauthorized only so far as it relates to the time and mode of paying the purchase money, and the the title to the lands having passed by the conveyance, the county holds that title as trustee."

Argument would seem to be unnecessary to show that neither of these cases can have any application to the case under consideration.

In conclusion we state the result of all the reasoning which can be drawn from the facts and law before the court.

First. There is no debt.

Second. There is no legal obligation to pay, which

might well be regarded as embraced in the first proposition.

Third. There is no ability or capacity to pay.

Fourth. The property sought to be subjected to the supposed lien is already devoted to public uses, from which no power exists in any court, to divert it.

We may conclude our argument by a quotation from that which was so well said by this court in the case of Rees vs. Watertown 19, Wallace, 124.

"We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit of question, that there is no chancery jurisdiction where there is an adequate remedy at law. * * * The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in this proceeding. * * The legal remedy is complete, and time and the law must perfect its execution."

Finally, can we do better for our client, the City of Litchfield, and the public which it represents as trustee, than to say, as was said in an earlier period of this litigation, "That the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases."

JOHN M. PALMER,
B. S. EDWARDS,
For Appellant.

X-190

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1884.

THE CITY OF LITCHFIELD, *Appellant*,

vs.

GEORGE W. BALLOU, ET AL., *Appellees*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLEES.

BY D. T. LITTLER.

SPRINGFIELD, ILL.:
H. W. ROKKER PRINTER AND BINDER.
1884.

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THE FACTS OF THE CASE.

The city of Litchfield, a municipal corporation of the State of Illinois, under the supposed authority of law and express provisions of its charter, issued $50,000 of its bonds for the purpose of constructing and establishing water works for the use of the city and its inhabitants. The provisions of law and of the charter bearing upon the legality of these bonds are set forth in brief of appellant's counsel.

These bonds were issued at various dates between the 30th of April, 1874, and the 19th of February, 1875, and were all purchased by G. W. Ballou, a portion at 92½ cents to the dollar, and a portion at 95 cents to the dollar, the aggregate amount paid therefor being the sum of $48,014.84. They were purchased upon the representations made by the city officers, to whom their execution and sale had been confided: "that the bonds were valid obligations of the city, and that there would be no question about payment of principal and interest, and it was upon these representations that the purchase was made." (See dep. of Ballou, page 42 of Record.)

The purchaser further states that he had no knowledge whatever, until after default had been made in the payment of interest on the bonds, of any alleged vice or defect in the bonds. Ballou subsequently sold these bonds at, or about, par to the several persons who are named as complainants with him in the amended bill. (Dep. of Ballou, page 43 of Record.)

Default was first made in the payment of interest upon the bonds July 1st, 1876, the interest of the previous year having been paid by the city of Litchfield. (Dep. of Ballou, p. 44 of Record.)

A test suit at law upon a large amount of the defaulted coupons was brought in the Circuit Court of the United States for the Southern District of Illinois, to the January term, A. D. 1877, and was tried at the same term. The city set up the invalidity of the bonds as a defense to the suit. Upon trial the Court held the bonds and coupons to be invalid. The plaintiff took the case to the Supreme Court of the United States, and by that Court the judgment was affirmed at its October Term, A. D. 1880. (See case of *Buchanan* v. *Litchfield*, 102 U. S. Rep. 278.)

The grounds upon which the bonds were held to be invalid were, that at the time of their issue the city was already indebted to the minimum amount allowed by the Constitution. (See case referred to.)

The bill in this cause was filed March 15th 1881, shortly after the final decision by the Supreme Court of the suit upon the coupons, and before the adjournment of the term of that Court at which the decision was rendered.

The money raised by the city of Litchfield from the sale of the bonds amounted to the sum of $48,014.84. This money, as shown by the evidence, was placed to the credit of a distinct and separate account kept by the city, called the "Water Fund account," and the entire amount was expended by the city in the purchase of a site for and the construction of its water works system. The water works so constructed with the money raised upon these bonds, are now, and have been ever since their construction, held and operated by the city for supplying itself with water. The facts are all alleged in the bill and the proof fully supports the allegations of the bill. (See Dep. of Grubb & Van Dusen, page 47 and 48 of record.) There is no controversy as to any of the facts.

GROUNDS FOR RELIEF ASSUMED BY THE BILL.

The theory of relief assumed by the bill is, that notwithstanding the bonds were wholly invalid, and no suit at law could be successfully maintained either upon the bonds or upon any contract as such growing out of the bonds, yet as the City of Litchfield is in possession of the money received for the bonds, or which is the same thing its equivalent in property identified as having been procured with this money, and having repudiated and disclaimed its liability in respect of the bonds, it must, upon well

established equitable principles, restore to the complainants what it actually received or at least so much of what it received, as is shown now to be in its possession, and in its power to restore.

The bill in this cause claims both a general decree for the money received, to be enforced against the city, and specially that a lien or trust be declared as against the water works property to be enforced as against the property for the relief of complainants. The bill may properly be held as wearing a double aspect, claiming generally reimbursement from the city for the money received by it, or specially, relief to the extent that the property identified as purchased with the money will afford relief.

On the hearing of this cause in the Court below, complainants expressly waived discussion of the question of the right to a general decree in favor of complainants for reimbursement by the city, for the reason that if the special trust in respect of the property acquired by the bonds should be held good and relief granted in respect of it, this might prove sufficient to satisfy the equity of complainants, and further proceedings be unnecessary.

The decree rendered by the Court below, fairly interpreted, goes no farther than this special relief so prayed. As the complainants had prayed for relief against the property acquired by the bonds in the modified form of a lien to be declared upon it, and a sale thereunder, instead of praying, as they might properly have done, for a delivery or conveyance of the property to them, it became necessary to ascertain and define the extent of complainants' equity in the property, in other words, to find what was the equitable sum and extent to which complainants might reimburse themselves from the proceeds of a sale, and hence the ascertaining and finding of

a sum of money "to be due from the City" must and should be interpreted as applying to and limited to the purposes merely of defining the extent of complainants equity as against the property rather than against the city. Counsel for the city, in their brief in this court (p. 25 of brief,) concedes that this is probably the proper interpretation of the decree, while expending much labor and space previously to show that the language of the decree is to be differently interpreted.

We propose for the present to confine the discussion to that aspect of the bill claiming relief in respect of the property purchased with the proceeds of the bonds, and as we think the question a plain and simple one, and resting upon well established equitable principles, we shall content ourselves with little more than a mere reference to authorities. It will readily be perceived how completely these authorities answer all the positions taken by counsel for appellants.

The doctrine of equity is that money or property received by a party under such circumstances as are set forth in the bill in this case has an implied trust character imposed upon it by mere operation of law independent of the intention of the parties, and as such will be enforced upon the conscience of the party.

2d Story's Eq. sec. 1254.

"The trust thus imposed belongs to a large class of trusts arising under the general head of 'implied trusts *in invitum*.'" And it is laid down by Story—Vol. 2d, sec. 1255, "That one of the most common cases in which a court of equity acts upon the ground of implied trusts *in invitum* is where a party has received money which he cannot conscientiously withhold

from another party. It has been well remarked that the receiving of money which, consistently with conscience, cannot be retained, is in equity sufficient to raise a trust in favor of the party for whom or on account of whom it was received. This is the governing principle in all such cases; and therefore whenever any interest arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now with a safe conscience *ex equo et bono* retain it."

The character of the trust fund or trust property is imposed under such a state of facts, and the party in possession is treated as a trustee for the benefit of the parties entitled, and thus the subject matter comes peculiarly within the jurisdiction of equity.

With this statement of the grounds of equity jurisdiction in the case, and the abundant illustration of the rule found in the cases hereinafter cited, we may dismiss, as requiring no further answer, the objection raised by appellee's counsel, that the jurisdiction, if any, should be at law and not in equity.

We cite here, as particularly illustrative of the principles before laid down by Story, the cases of

Chapman vs. *County of Douglas*, 17th Otto, (107th) United States, 34[2].

Pimental vs. *City of San Francisco*, 21st Cal. 362.

Argenti vs. *Same*, 16 Cal. 282.

Parkersburgh vs. *Brown*, 106 U. S., 486.

Marsh vs. *Fulton Co.*, 10th Wal., 676-678.

Wrought Iron Bridge Co. vs. *Town of Utica, et. al.* Chicago Legal News, Aug. 4th, 1883.

Attention is called to the concluding words of Judge Field in the case cited, 10th Wallace 676-678, both for the reason that it illustrates the doctrine of Story, and for the reason that in the subsequent cases of *Chapman* vs. *Douglas Co.*, *Parkersburgh* vs. *Brown*, and *Wrought Iron Bridge Co.* vs. *Town of Utica*, it will be seen they have been adopted as sound doctrine, and practical application thereof made in cases closely analagous to the case now before the Court. After deciding the bonds in the case before the Court in that case to be void, Justice Field concluded:

"We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

And Justice Harlan, in conclusion of his opinion in the case of *Buchanan* vs. *Litchfield*, (the suit at law holding the bonds in this case void), suggestively says (102 U. S., p. 293):

"Whether the city is under a legal obligation to make restitution of the money obtained without authority of law, that is to refund to the proper party or parties such sums as were actually received by its authorized agents or officers upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds. Upon this point it is not proper at this time, *or in this form of action*, to express an opinion."

What would have been the opinion of Judge Harlan and of the Court as a whole, had the case and form of action permitted, was fully disclosed in the subsequent cases above cited.

In the case of *Parkersburgh* vs. *Brown*, 106 U. S., 487-503, in which the Court, after holding bonds issued by that city in aid of manufacturing enterprises to be void, the city having received in exchange certain securities and real estate, say (p. 503)—

"But notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call upon the city to account for it. The enforcement of such a right is not in affirmance of the illegal contract but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it, is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received. * * * The O'Briens having indorsed and sold the bonds, the holders of the bonds succeeded to such right of the O'Briens as an incident of the ownership of the bonds."

The case of *Chapman* vs. *County of Douglas*, 107th U. S., 348, is more closely analagous to the case before the Court.

In that case land had been purchased by a county for a County Poor House, and was so used by the county. The notes of the county and a mortgage upon the land had been executed by the county for purchase money, which were subsequently declared invalid. An assignee of vendors thereupon filed a bill for a reconveyance of the land, which the Court below refused, and dismissed the bill, but on appeal this Court reversed the decision of the Court below and granted the relief prayed, the decree being *nisi*, however, giving the county leave to pay the sum equitably due.

It is impossible to distinguish this case in its essential features from the case at bar.

It will be seen that the Court held the county to be a trustee as to the property acquired, and notwithstanding the property had been devoted by the county to public municipal use as important in every respect as the supplying of a small city with the luxury of water works, and notwithstanding $30,000 had been

expended in improvements upon the property, yet the Court decreed its re-conveyance, unless the equitable obligation to pay for it should be discharged.

The case of *The Wrought Iron Bridge Co.* vs. *Town of Utica et al.* (Chicago Legal News of Aug. 4th, 1883) was a case where the two towns had contracted in a manner not authorized by law for the construction of an iron bridge across a stream dividing the two towns. After the bridge was completed the towns refused payment, alleging want of power to contract for same. Suits at law having been brought, against the towns and the liability at law having been denied by the courts, a bill in chancery was filed for the property and material in the bridge to be decreed to the complainants, and the Court so decreed, unless the equitable amount due complainants should be paid. The decision was based upon the cases referred to in this brief.

This case was not appealed from, and although it is a Circuit Court opinion, it is significant as showing the understanding of the courts and the profession of the purport of the decisions rendered by this Court and their now general recognition.

It is to be noted that it does not appear to have been objected or suggested even by either Court or astute counsel in any of the foregoing cases that the remedy was at law—that the parties in the bridge case should have brought assumpsit "for work and labor and materials furnished in and about the construction of a certain bridge." Or in the case of *Chapman* vs. *County of Douglas*, that the suit should have been at law under a count "for land bargained, sold, and conveyed" to the county.

Authorties are abundant in the State Reports holding the same salutary principles declared by this Court.

In *Tracy* vs. *Talmage*, 14th N. Y., 217, the Court says:

"It is admitted that the contract of a corporation which it has no capacity to make, cannot in its terms be enforced. But does it follow that the alleged transgressor may appropriate without compensation the money or the goods of a person with whom he deals."

In *Curtis* vs. *Leavitt*, 15th N. Y., p. 1, the Court, in discussing the doctrine of *ultra vires*, as applied to municipal corporations and the sound policy to be applied, says:

"I cannot doubt that a sound policy will be promoted by restoring the parties in all such cases to their position. It leaves no inducement for either party to contravene the law. The corporation is compelled to return just what it has received. The other party gets no more than he has parted with. It is believed that not a solitary case can be found which stands opposed to this salutary rule."

See also:

Bank vs. *Bank*, 24th N. Y., 290.
Paul vs. *Kenosha*, 22d Wis., 266.
Nelson vs. *Mayor*, 63 N. Y., 544.

OBJECTIONS ANSWERED.

Several points of objection to the remedy sought by the bill are made in the brief filed for appellant in this case, none of which merit any extended answer.

THE REMEDY AT LAW.

1st. It is objected that the remedy, if any, that complainants were entitled to, was at law, and such being the case there is no jurisdiction in equity. If we were to concede that an elective remedy at law did exist, it would not oust a Court of Equity of its recognized jurisdiction in all matters of trust.

The foundation of the equitable jurisdiction is, that equity imposes the character of a trust, a constructive trust, *in invitum*, in so far as money or property has been obtained, which a party in good conscience cannot retain (as under the facts disclosed here) and hence the jurisdiction is peculiarly, if not solely, in equity rather than at law; and if no adequate legal remedy exists, that but strengthens the jurisdiction in equity. The doctrine of restoratives in such cases is of equitable and not legal cognizance. Indeed the argument of appellant's brief is a skillful ignoring of the theory upon which this Court has proceeded in the cases referred to in this brief. How is the City of Litchfield to be made to respond to an action at law for a *debt* which Counsel insist, and we concede, has no *legal existance?*

Parties in pari delicto.

2d. It is objected that as the issue of these bonds was against public policy, and the parties are in *pari delicto*, courts of equity will aid neither as against the other, but leave them as they placed themselves, and this upon both the legal and equitable maxim "*ex turpi contractu actio non oritur.*"

This objection is founded on a misconception of the character of the transaction. There was no moral turpitude in the transaction, at least none that could be imputed to the purchasers of the bonds. They acted in good faith and upon the representations of the officers of the city that the bonds were valid legal obligations, and that the city would certainly pay interest and principal as it matured. To impute moral turpitude to them under these facts would be a monstrous perversion of language as descriptive of the moral character of an act.

Whilst the act of issuing the bonds was illegal and void, no crime was necessarily involved in it. As this Court is aware, a large number of cases of such acts, adjudged illegal and void, have arisen in this and other courts, where the courts themselves have been divided and in doubt as to the legality of the transactions, and in doubt as to whether to adjudge the act valid or invalid. The law imposes no other penalty than that which it visits upon the contract itself, holding it void and of no force.

The cases cited upon the brief of defendant's counsel were cases where the courts imputed moral turpitude to the transaction, or where the law in addition to making the act or transaction void, imposed penalties upon the parties engaged in them. The leading case is that of:

Thomas vs. *City of Richmond* 12th Wall. 349, and in its facts, and the statutes under which it arose, clearly shows the dividing line between the classes of cases wherein the principle involved will be applied and where not, and the subsequent cases of *Chapman* vs. *Douglas County*, and *Parkersburgh* vs. *Brown*, heretofore quoted, show that there is no ground whatever for applying that maxim to such a case as is now before the Court. The doctrine will be found to be fully discussed in the cases here cited.

MUNICIPAL CORPORATE PROPERTY NOT SALEABLE.

3d. It is objected, however, that the statutes of Illinois, and public policy, forbid the taking of public property of this discription for the payment of corporate debts, and that the Court has no right to contravene the policy of the law by taking this property for the satisfaction of complainants.

The statute, it is true, has made provision as to the manner of discharging the authorized debts and liabilities of a municipal

corporation by the assessment and levy of taxes to discharge them, and having made this sufficient provision for liabilities, such as it may legally incur, forbids the seizure of property in corporate use for the satisfaction of such liabilities. But these provisions do not cover the whole ground of equitable remedies where the case is such as to authorize a different remedy. From the authorities already quoted it is clear that municipalities may subject themselves to equitable obligations "independant of any statute," and for these equitable obligations equity devises the proper remedy.

It is very clear that counsel have misconceived the theory of the relief prayed by complainant. These water works having been constructed with the proceeds of the bonds repudiated by the city, the doctrine of equity is, that they equitably belong to the persons who furnished the means of their construction, that the city in equity has no right or title thereto, and must restore the property to its rightful owners. This proceeds upon a different theory altogether from that upon which judicial proceedings to seize property of a debtor in satisfaction of a debt is founded. This latter proceeding recognizes the ownership of the property to be in the defendant to the process of execution; whereas by the theory of equity as applied to this property, the equitable right and title to it is already in the complainants, and the Court is asked simply so to declare it. If a county builds its court house upon land or with material to which it has acquired no title or had no title, the fact that it is in corporate use does not prevent the proper owner from asserting title. The case of *New Orleans* vs. *Morris*, 105th U. S., p. 601, is cited as an authority for appellant's position, but it will be seen by a reference to the facts of the case, that it has no analogy to the case before the court

whatever. That was a case in which it was sought to subject the interest of the city in the water works for an ordinary debt upon a judgment against the city. The case did not proceed upon the ground presented here, that the water works having been erected with the money of complainants, and the contract for the money having been repudiated, the complainants are entitled to a restoration of the property regardless of the purpose to which the city may have applied the property. The other cases cited are similar in character and do not touch the question here.

This was the distinct point presented in the cases of *Chapman* vs. *Douglass County*, and the *Wrought Iron Bridge Co.* vs. *Town of Utica*, before referred to in this brief. It cannot be pretended that water works are any more essential to a city than a poor house for a county, or a bridge for highway purposes for a town, as were the examples of the application of the true doctrine afforded in these cases last cited.

STATUTES OF LIMITATION.

It is further objected that the statute of limitation applies as a defense here, and that statute is set up by way of defense.

It is alledged in support of this plea that the evidence shows that the last money received on the bonds was on February 19th, 1875, and that the bill in this case was not filed until the 15th day of March, 1881, and that the statute should be held as beginning to run from the receipt of the money by the city.

The evidence in this case shows that these bonds were purchased by complainants upon the representation of the officers and agents of the city that they were good and valid obligations of the city, and that they would be paid, interest and principal, as they matured; and that in pursuance of and in fulfillment of

that representation, the interest maturing upon the bonds July 1, 1875, was paid by the city, and no default occurred or was in any way notified to the complainants until the default on the coupons maturing July 1, 1876. Even then it does not appear that the holders of the bonds had any notice of the intent of the city to repudiate the bonds on the ground of want of power to issue them until that defense was set up to the suit upon the coupons, tried at the January term of the Court, A. D. 1877.

Default having been made in the payment of the interest July 1, 1876, suit upon the coupons, as a test case, was commenced to the first ensuing term of the Court (January term, A. D., 1877), and diligently prosecuted until its final termination in the Supreme Court of the U. S., at its October term, A. D. 1880; and shortly thereafter (and whilst the term of the Supreme Court was yet in session at which that suit was decided) this bill was filed in this cause in the Court below.

This does not look much like *laches* on the part of complainants: on the contrary, it looks very much like great and unusual diligence.

Surely the bondholders were not only excusable, but justified, in prosecuting their supposed remedy at law to the court of last resort, considering the doubtful character of the questions involved, and well understanding that until any supposed legal remedy was exhausted their remedy in equity would be questionable. Their good faith in thus prosecuting to final determination the suit at law cannot be questioned.

Where was there *laches?*

We need only confine ourselves to the inquiry of whether in equity it would be permissive for the city of Litchfield to set up

the Statute of Limitations as running against these complainants during that period of time, that its officers (its inhabitants acquiescing) were fraudulently beguiling these bondholders into security by paying the interest as it accrued upon the bonds. The July interest, 1875, was paid, and not until July, 1876, was there ever any adversary position assumed by the city towards the bonds. We think we may safely assume that no court of equity would allow the Statute of Limitations to run as against these complainants before that time, and that brings to us a period much within the five years to the filing of this bill. And yet counsel have the hard face to insist that the statute should be applied as running from the date of the last purchase of bonds, Feb. 19th, 1875.

Whilst counsel have correctly quoted from the authorities the rule as to the application of the Statute of Limitations in equity, yet they have not quoted the qualifications to these rules, also laid down by the authorities.

It is true, as quoted from the authorities, "that courts of equity consider themselves within their [Statute of Limitations] spirit and meaning," and in analogous cases where the remedy is barred at law it is barred in equity. But mark! the cases must be analogous. Where a party owes another money which is due and unpaid, or places himself in an adversary position towards his creditor either with respect to a money demand or property, from that time at law the statute begins to run and not before. When the city of Litchfield, on the 1st of July, 1876, for the first time defaulted on her interest on these bonds in analogy to the statute in cases at law, the statute may be said to have begun to run, and not before.

Surely no court of equity would allow it to run whilst the city was deluding its creditors with its representations that its bonds were valid obligations and would be paid. And this was the action and conduct of the city to so late a period at least as the 1st of July, 1876.

It is contended, however, by counsel that Ballou, when he filed the original bill in this cause, March 15th, 1881, although he may have been acting as trustee for the other holders of the bonds, had in fact no interest in them, and that as the real parties in interest were not joined as co-complainants until August 23d, 1882, the statute had fully run before this amendment, if it be conceded that July 1st, 1876, be the proper date at which to start the running of the statute.

It will be seen by reference to the deposition of Ballou, (p. 44 of Record) that the several complainants sent their bonds to him with instructions to commence suit in his own name, and that he was authorized as their trustee to file the original bill in this cause. The original bill fully described and set forth the nature, particulars and extent of the claim, and the bill was filed by one who was authorized to act as their trustee in the matter of the suit. The subsequent amendment simply introduced into the causes the principals or parties beneficially interested. That upon general principles, both at law and in equity, the amendment, so far as the running of the Statute of Limitations was concerned, would relate to the filing of the original bill, we think is beyond question.

In the State of Illinois at least this is a settled question:

"On a life policy of insurance containing a clause that no action should be brought thereon after eighteen months after the death of the insured, an action was improperly brought in the name of

the assignee within the time limited, instead of the name of the administrator of the deceased, and judgment of recovery had, which was reversed for want of a proper party plaintiff. Thereupon, by leave of court, an amendment was made substituting the administrator of the party whose life was insured in place of his assignee, and a new count was filed upon precisely the same cause of action, but this was after the expiration of the period of limitation: Held, that the amendment related back to the commencement of the suit, and that the limitation could not be idvoked to defeat the action."

U. S. Ins. Co. vs. *Ludwig*, 108th Ill., 514.

So that even if it should be held that it would be equitable to permit the statute to run after the 1st of July, 1876, the rights of complainants under a bill filed March 15th, 1881, would be saved.

But we have seen from the character of the controversy in this case that the bondholders were amply justified in exhausting their supposed remedies at law before resorting to a court of equity. The peculiar question presented by the case of *Buchanan* vs. *Litchfield*, 102 U. S., 293, had never before been authoritatively settled. This test suit had been diligently prosecuted; began in 1877, it was finally determined here early in 1881, and if it were necessary to appeal for the application in their true spirit to the rules as recognized in the authorities we shall now quote, we should insist that there was no proper room or place to start the Statute of Limitations running against the claim as now presented, until after the final adjudication of the suit at law in this Court upon the bonds.

Says Story (sec. 1521, vol. 2): "Courts of equity not only act in obedience to the Statute of Limitations in proper cases, but they also interfere in many cases to prevent the bar of the statute where it would be inequitable or unjust. Thus, for example, if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, courts of equity

will interpose and remove the bar out of the way of the other injured party. *A fortiori* they will not allow such a bar to prevail by mere analogy, to suits in equity where it would be a furtherance of a manifest injustice." And in support of this qualification of the general rule the author cites a host of cases.

And a recent author (Tiffany & Bullard on Trustees, page 720,) says, upon the general question of the application of the Statute of Limitations in cases of equity: "But whether the Statutes of Limitation shall or shall not be applied to any given case in equity, would seem to depend more upon the apparent equity of the parties litigating than upon any very definite rules of general application, at least so far as the administration of trusts are concerned."

We submit this somewhat hastily prepared response to the brief of Appellant, filed in this cause, fully persuaded that the decree, so far as rendered in the Court below, although as yet it is somewhat interlocutory only, is in line with established principles already fully established by this court.

D. T. LITTLER,
Solicitor for Appellees.